No. SC92101

In the Supreme Court of Missouri

TERRANCE ANDERSON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from Cape Girardeau County Circuit Court
Thirty-Second Judicial Circuit
The Honorable William L. Syler, Judge

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Terrance Anderson is appealing the denial of his Rule 29.15 motion which sought to vacate his death sentence for murder in the first degree, section 565.020, RSMo 2000. Appellant was initially convicted of two counts of first-degree murder for killing Stephen and Deborah Rainwater. *State v. Anderson*, 79 S.W.3d 420, 427 (Mo. banc 2002) (*Anderson I*). He was sentenced to life without parole for the murder of Stephen Rainwater and to death for the murder of Deborah Rainwater. *Id.* This Court affirmed the convictions on appeal. *Id.*

Appellant then filed a Rule 29.15 motion that resulted in this Court vacating the death sentence and remanding for a new sentencing hearing on Deborah Rainwater's murder. *Anderson v. State*, 196 S.W.3d 28, 33 (Mo. banc 2006) (*Anderson II*). That penalty phase retrial was held before a jury on November 6-12, 2008, the Honorable William L. Syler presiding. (L.F. 32-33).[1] The jury assessed Appellant's punishment at death for Deborah

[1] The record on appeal will be cited as: SC89895 Direct Appeal Legal File (L.F.); SC89895 Direct Appeal Supplemental Legal File (Supp. L.F.); SC89895 Direct Appeal Transcript (Tr.); SC92101 Post-Conviction Legal File (PCR L.F.); SC92101 Post-Conviction Transcript (PCR Tr.).

Rainwater's murder and the court sentenced Appellant in accordance with that recommendation. (L.F. 225-28). The jury's verdict was affirmed on direct appeal. *State v. Anderson*, 306 S.W.3d 529, 534 (Mo. banc 2010) (*Anderson III*). Appellant now raises several post-conviction claims relating to that resentencing hearing. Viewed in the light most favorable to the verdict, the evidence at the resentencing hearing showed:

Appellant had been involved in a relationship with the victims' daughter, Abbey,[2] when she was sixteen years old and Appellant was twenty-one. (Tr. 642, 657, 751). In 1996, Abbey discovered that she was pregnant with Appellant's child. (Tr. 643-44, 660). Abbey broke up with Appellant shortly before the child was born. (Tr. 644, 666). Appellant continued to see Abbey because he wanted to be involved in the child's life. (Tr. 667).

In July of 1997, Abbey told her father that Appellant had been abusing her. (Tr. 643, 678). Stephen helped Abbey get a restraining order against Appellant on July 25th. (Tr. 644-45). Abbey told Appellant about the restraining order during a phone conversation that afternoon, and she said that visitation with the child would be worked out by the courts. (Tr. 646). Appellant was angry. (Tr. 646).

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[2] To avoid confusion, the various members of the Rainwater family will hereafter be referred to by their first names. No disrespect is intended.

That night, Abbey and some of her friends were hanging out in the basement of her home when they heard a knock at the window. (Tr. 642, 647). They told Stephen and together they investigated, but did not find anything. (Tr. 647-48). Stephen decided to investigate further by driving around the neighborhood. (Tr. 648). Abbey and her friends stayed behind at the house along with Deborah; Abbey's baby; and Abbey's younger sister, Whitney. (Tr. 648).

The doorbell rang about ten minutes after Stephen left. (Tr. 691). One of Abbey's friends looked out the window and saw Appellant with a gun. (Tr. 691). Appellant kicked in the door. (Tr. 692). Deborah told Abbey to run, and Abbey ran out the back door towards a neighbor's house to call 911. (Tr. 649-50). Whitney started to go with her. (Tr. 719).

Appellant entered the home yelling at Deborah. (Tr. 628). He forced Deborah to her knees. (Tr. 791). She was holding the baby and begged Appellant not to shoot her. (Tr. 628). Appellant said, "I told you I was going to do this," placed the gun against the back of her head, and then shot her. (Tr. 605-09, 630).

When Whitney heard the gunshot she returned to the house. (Tr. 719-20). She pulled the baby from under her mother's body. (Tr. 720). Whitney tried to hide, but the baby was crying and Appellant found them. (Tr. 721). He took Whitney and the baby out front. (Tr. 721-22). Appellant made

Whitney yell for Abbey to come back. (Tr. 722). Appellant yelled that he would shoot the baby if Abbey did not return. (Tr. 722). He put the gun to the baby's head. (Tr. 633).

It was about that time that Stephen returned. (Tr. 723). Appellant made Whitney hide at the side of the house and went to confront Stephen. (Tr. 723). They spoke for a moment, and Appellant shot Stephen in the head. (Tr. 724, 779-81).

Appellant then took Whitney and the baby inside the house. (Tr. 724). He forced Whitney to search the house for any of the other girls. (Tr. 724). She found one of Abbey's friends hiding in the shower, but told Appellant that no one was there. (Tr. 724-25). Police officers arrived shortly thereafter. (Tr. 781). They set up a perimeter around the house and ordered Appellant to come out. (Tr. 553-56). After some delay, Appellant surrendered. (Tr. 554-56).

Appellant testified and admitted to the shootings. (Tr. 775). He further admitted that he went to the house with the intention of killing Stephen, Deborah, and Abbey. (Tr. 787, 795-96). Appellant said that he wanted to be involved in his baby's life and was angry that the Rainwaters had restricted his access to the child. (Tr. 756, 774-75). He also testified to a series of disputes he had with Stephen and Deborah Rainwater. (Tr. 753-63). Appellant said that he was testifying because he owed it to the Rainwater

family to let them really know what happened the night of the murders. (Tr. 751).

Louis Buchanan was a friend and former roommate of Appellant. (Tr. 834). He testified that he witnessed arguments between Appellant and the Rainwaters. (Tr. 836). Buchanan answered the phone on occasions when Stephen Rainwater called Appellant and that Stephen, thinking he was talking to Appellant, made threats laced with racial epithets. (Tr. 836-38).

Appellant called several other witnesses to provide mitigation testimony. Childhood friend Jason Brandon testified that Appellant was funny and cracked jokes, and that he was happy when he learned that Abbey was pregnant. (Tr. 736, 738). Brandon said that he was shocked when he learned about the murders and that he had never seen Appellant act out in a violent way before. (Tr. 739). Brandon's father, Donald, testified that Appellant was always respectful as a guest in his home, and that he gave Appellant a job in 1995 at a furniture store where he also worked. (Tr. 744-45). Donald Brandon testified that he saw Appellant on the day of the murders and did not notice anything out of the ordinary. (Tr. 746). Brandon said that knowing what he knew of Appellant, he could not picture him committing the murders. (Tr. 746).

Timothy McMillian was a friend and high school basketball teammate of Appellant. (Tr. 798-99). He described Appellant as quiet, polite, and mild-

mannered. (Tr. 801). McMillian said he was shocked when he heard about the shootings and would not have expected that behavior from Appellant. (Tr. 802). Another high school basketball teammate, Kevin Pruitt, also said that he never saw Appellant get angry or violent. (Tr. 841-42). Pruitt said that he was shocked by the shootings because he did not think Appellant was capable of that. (Tr. 843). Another childhood friend, Mark Hunt, also described Appellant as nice and humble and non-violent. (Tr. 848).

Appellant's high school basketball coach, Larry Morgan, said that Appellant was a student aide for the physical education class he taught, and that Appellant was dependable and upbeat and never caused any problems. (Tr. 805-06). Morgan said that Appellant's stepfather, Robert Smith, was always there to support the team. (Tr. 808). Morgan said he never saw any indication of violent behavior by Appellant. (Tr. 814). Appellant's junior varsity basketball coach, Mike Brey, testified that Appellant was very mild-mannered and soft-spoken. (Tr. 885). Brey said he did not remember Appellant getting inappropriately angry at anyone. (Tr. 887). Brey said that Appellant was one of the last kids he would have expected to be involved in something like the murder of the Rainwaters. (Tr. 890).

Appellant's cousin, Mark Hunt, also described him as nice and humble, and said that he never knew Appellant to get into a fight. (Tr. 848). Hunt

said that he could not believe it when he heard about the murders because that act was not the content of Appellant's character. (Tr. 848).

Appellant's mother, Linda Smith, testified that Appellant was affected by two incidents that happened close in time – the death of his grandfather and the discovery that Robert Smith was not his biological father. (Tr. 823). Robert Smith's daughter, Appellant's step-sister, Deborah Moore, testified that Appellant was very polite and pleasant. (Tr. 829-30). She said that she was stunned when she heard about the murders. (Tr. 831).

Robert Smith testified that he met Appellant's mother when Appellant was ten months old and that he treated Appellant as his own son. (Tr. 850). He described Appellant as a quiet, easy-going kid. (Tr. 850). Smith said that he missed perhaps one of Appellant's high school basketball games in four years. (Tr. 851). Smith said that Appellant was close with his grandfather and seemed saddened and reserved after his grandfather died. (Tr. 852). Smith said he did not discuss with Appellant the fact that he was not his biological father because he felt that they had a good family and a good relationship, and he did not see the need to change that. (Tr. 852-53). Smith said that Appellant was happy to be a father and quite protective of his child. (Tr. 857-58). Smith testified that he might love Appellant more since the shootings because he felt for him. (Tr. 860).

Appellant also presented the deposition of Donald Roper, the warden at Potosi Correctional Center. (Supp. L.F. 14). He testified about Appellant's generally good behavior at the prison. (Supp. L.F. 14-27).

The jury found the existence of two statutory aggravating circumstances: (1) that the murder of Deborah Rainwater was committed while Appellant was engaged in the commission of another unlawful homicide of Stephen Rainwater, and (2) that the murder of Deborah Rainwater involved depravity of mind in that Appellant killed Deborah Rainwater as part of a plan to kill more than one person. (L.F. 189). As previously noted, the jury assessed Appellant's punishment at death for Deborah's murder and the court sentenced Appellant in accordance with that recommendation. (L.F. 225-28).

This Court's direct appeal opinion affirming the sentence was issued on March 9, 2010. (PCR L.F. 34). The mandate issued on April 20, 2010. (PCR L.F. 34). Appellant filed a *pro se* Motion to Vacate, Set Aside or Correct the Judgment or Sentence under Supreme Court Rule 29.15 on July 19, 2010. (PCR L.F. 1). Appointed counsel filed an amended motion on October 18, 2010. (PCR L.F. 1-2). Appellant filed a motion to disqualify the motion court on November 3, 2010, and that motion was denied at a hearing on November 8th. (PCR L.F. 2-3). The court conducted an evidentiary hearing on April 19-20, 2011, and a stipulation regarding the testimony of Earline Smith was

entered into evidence on May 26, 2011. (PCR L.F. 3). The motion court issued its Findings of Fact and Conclusions of Law on September 8, 2011, denying the claims raised in the amended motion. (PCR L.F. 4). Additional facts specific to Appellant's claims of error will be set forth in the argument portion of the brief.

STANDARD OF REVIEW

All but Appellant's first point claim that he received ineffective assistance of trial and appellate counsel and was prejudiced as a result. In reviewing the overruling of a Rule 29.15 motion, the motion court's findings are presumed correct. *Zink v. State*, 278 S.W.3d 170, 175 (Mo. banc 2009). A motion court's judgment will be overturned only when either its findings of fact or its conclusions of law are clearly erroneous. *Id.*; Supreme Court Rule 29.15(k). To be overturned, the ruling must leave the appellate court with a definite and firm impression that a mistake has been made. *Zink*, 278 S.W.3d at 175. The motion court's findings should be upheld if they are sustainable on any grounds. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991).

To be entitled to post-conviction relief for ineffective assistance of trial counsel, the movant must satisfy a two-prong test. *Zink*, 278 S.W.3d at 175 *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the movant must show that his counsel failed to exercise the level of skill and diligence that a reasonably competent counsel would exercise in a similar situation. *Zink*, 278 S.W.3d at 175. To meet this prong, a Rule 29.15 movant must overcome a strong presumption that counsel's conduct was reasonable and effective. *Id.* at 176. The second prong requires the movant to show that he was prejudiced by trial counsel's failure. *Id.* at 175. On death penalty

sentencing claims, the movant must show a reasonable probability that the jury, balancing all the circumstances, would not have recommended the death penalty. *Id.* at 176. The existence of both the performance and the prejudice prongs must be established by a preponderance of the evidence in order to prove ineffective assistance of counsel. *Id.* at 175.

The standard for reviewing a claim of ineffective assistance of appellate counsel is essentially the same as that employed with trial counsel; movant is expected to show both a breach of duty and prejudice. *Mallett v. State*, 769 S.W.2d 77, 83 (Mo. banc 1989). To prevail on a claim of ineffective assistance of appellate counsel, a Rule 29.15 movant must show that his counsel failed to raise a claim of error that a competent and effective lawyer would have recognized and asserted. *Williams v. State*, 168 S.W.3d 433, 444 (Mo. banc 2005). Appellate counsel is not, however, required to raise every possible issue asserted in the motion for new trial, and is under no duty to present non-frivolous issues where counsel strategically decides to winnow out arguments in favor of other arguments. *Storey v. State*, 175 S.W.3d 116, 148 (Mo. banc 2005). A Rule 29.15 movant must also show that the claimed error was sufficiently serious to create a reasonable probability that, if it was raised, the outcome of the appeal would have been different. *Williams*, 168 S.W.3d at 444.

ARGUMENT

I.

The motion court was not required to disqualify itself.

Appellant claims that the motion court clearly erred in denying a motion to disqualify itself because the court's comments and actions created the appearance that the court could not fairly consider the claims raised in the Rule 29.15 motion that trial counsel was ineffective for failing to present mental health evidence. But the record demonstrates that the court based its various rulings in the Rule 29.15 proceedings on the law and the facts that it obtained while presiding over the trials and post-conviction proceedings, and that the court did not have a disqualifying bias that prevented it from fairly deciding the issues raised in the 29.15 motion.

A. Underlying Facts.

At his first trial, Appellant presented a guilt phase defense that he lacked sufficient mental capacity to deliberate at the time of the killings. *Anderson I*, 79 S.W.3d at 429. In support of that defense, Appellant called as witnesses neurologist Dr. Jonathan Pincus and psychiatrist Dr. Dorothy Lewis. *Id.* In addition, defense counsel filed an *ex parte* pre-trial motion seeking to have Appellant secretly transported to Barnes Hospital in St. Louis to undergo a battery of mental and neurological tests. *Id.* at 433. The trial court, which was the same as the motion court, denied that motion. *Id.*

Shortly after being appointed to represent Appellant in this case, post-conviction counsel filed a motion to have Appellant transported by the Department of Corrections to the Washington County Memorial Hospital for an MRI and an EEG. (PCR L.F. 2). When the motion was brought up at a hearing, the motion court asked, "Well, haven't we been down this road before?" (PCR Tr. 6). Post-conviction counsel explained that Appellant had not previously undergone either an MRI or an EEG because the request made prior to the 2001 trial had been denied by the court. (PCR Tr. 6). Counsel noted that Dr. Lewis had recommended such testing prior to the sentencing phase retrial, but no request for such tests had been submitted to the court. (PCR Tr. 7). The motion court responded, "It seems to me that was so discredited the first time around, that it was not necessary to put it on the second time." (PCR Tr. 7). Defense counsel answered that she did not know that the mental health evidence was discredited and she did not know why the jury chose to give Appellant a life sentence for killing Stephen Rainwater and a death sentence for killing Deborah Rainwater. (PCR Tr. 7). The motion court told counsel that it could only speak about a conversation it had with the foreperson of the first jury, since deceased, who told the court that the mental health evidence "was pretty well trashed." (PCR Tr. 7-8). Counsel responded that she believed there was ample evidence of possible brain injuries due to amniotic fluid being affected at the time of Appellant's

birth, and that Appellant's mother had a history of epileptic seizures which also could have affected Appellant. (PCR Tr. 8). When asked if he had any objection to the testing, the prosecutor responded that he did not "buy any of it," but that he did not object. (PCR Tr. 8). The motion court then stated, "I don't buy any of it either, but in an abundance of caution to keep it from being an issue later on, I will sign off on the orders. That's the only reason." (PCR Tr. 8).

The amended Rule 29.15 motion contained claims that counsel at the penalty phase retrial were ineffective for failing to present mitigating mental health evidence through the testimony of various witnesses, including Drs. Dorothy Lewis and William Holcomb. (PCR L.F. 35-55, 61-73). A few days after filing the amended motion, Appellant filed a motion to disqualify the motion court. (PCR L.F. 2). The motion alleged that the court's comments at the previous hearing about the mental health evidence indicated that the court had prejudged the mental health issues that were raised in the amended Rule 29.15 motion. (PCR L.F. 149-50). The motion alleged that the court handed counsel a copy of a 2004 article from the New Yorker magazine discussing a lawsuit Dr. Lewis filed, in which she claimed that a Broadway play about a psychiatrist who studies serial killers had improperly used material from a book she had written about her own experiences studying serial killers. (PCR L.F. 151-52, 163-67).

At a hearing on the motion to disqualify, the court stated that it had only tried to make the point that it appeared from the jury foreman's comments that Dr. Lewis's testimony at the first trial had been ineffective. (PCR Tr. 13). The court said that was a decision made by the jury, not the court, and while the court agreed with that assessment that did not prevent the court from listening to Dr. Lewis's testimony in the future and deciding if it was appropriate. (PCR Tr. 13). The court explained its conversations with the jury foreman by stating that the foreman and the court attended the same church, and the foreman had asked the court about the status of the case, while offering some comments about the case from time to time. (PCR Tr. 13-14). The court said that it did not know if the foreman was speaking for the entire jury or not, but that it would take the comments as being the opinion of the foreman alone. (PCR Tr. 14). The court denied the motion. (PCR Tr. 14).

At the Rule 29.15 evidentiary hearing, Appellant presented the live testimony of Dr. Holcomb and the deposition testimony of Dr. Lewis to support the claims that counsel were ineffective for failing to present mental health testimony at the penalty phase retrial. (PCR Tr. 20, 33-76). In denying the claims, the motion court noted that Dr. Lewis's deposition testimony that Appellant suffered from a mental disease or defect and was not responsible for his conduct was presented in the guilt phase of the first

trial. (PCR L.F. 184). After reviewing Dr. Lewis's deposition testimony and the basis for her opinions, the motion court made the following findings:

> The Court finds that Dr. Lewis' testimony would have been no more persuasive in the latest trial than it would have been in the first. She has very little explanation to support her conclusion that Movant was in an "altered state" that made him unable to conform his conduct to the law. Dr. Lewis is simply not credible and the Court believes the best evidence of this is the outcome of the first trial.
>
> Dr. Lewis' theory that Movant was in a "dissociative state" during the shootings, having selective total amnesia and then partial amnesia as to the shooting of Steven (sic) Rainwater, appears just as questionable now as it did in the first trial.
>
> Dr. Lewis also did not have a good grasp of the facts, which would further hurt her credibility. She described Movant as descending into an altered state over time due, in part, to a court order Abbey Rainwater had received. The order of protection had, in fact, been issued the day of the murders, July 25, 1997. (Exhibit 38; Tr. 645). She relied on statements Movant attributed to Stacey Blackmon, which Ms. Blackmon denied making.

> Finally, as will be noted later, it appears that Dr. Lewis was the victim of a fabrication by Movant that damaged any credibility she might otherwise have had.

(PCR L.F. 186). The fabrication that the court referred to was Appellant's admission to counsel during the retrial that he had lied about having amnesia about the shooting of Deborah Rainwater. (PCR L.F. 195). The court concluded that Dr. Lewis testified at the first trial to the very things that Appellant claimed that she should have testified to in the second trial. (PCR L.F. 202). The court concluded that counsel was not ineffective for determining that a claim of diminished capacity was not successful in the first trial and would not be successful with a second jury (PCR L.F. 202-03). The court also found that Dr. Lewis's testimony about Appellant hearing voices was at odds with Dr. Holcomb's testimony, and the court concluded that Dr. Lewis was gullible for believing that Appellant was hearing voices. (PCR L.F. 203). The court further noted that the EEG and MRI tests conducted for the Rule 29.15 proceedings demonstrated an absence of pathology, thus refuting Dr. Lewis's suspicion that Appellant had brain damage. (PCR L.F. 203).

On the claim of failing to call Dr. Holcomb, the court found that counsel made a strategic decision, based partly on the consideration that his testimony could open the door to rebuttal testimony from a State's expert.

(PCR L.F. 203). The court went on to find that while Dr. Holcomb "came across as more rational and reasonable than Dr. Lewis," he also suffered from a lack of credibility due, in part, to his reliance on Dr. Lewis's conclusions and reports. (PCR L.F. 204). The court found that Dr. Holcomb could give no explanation for why Appellant's amnesia was selective and could give no rational explanation as to why Appellant was able to testify about killing Deborah Rainwater after years of claiming amnesia. (PCR L.F. 204).

Also at the Rule 29.15 evidentiary hearing, direct appeal counsel Deborah Wafer was asked if she had ever raised proportionality review in a double homicide case where the defendant received life without parole for one murder and the death penalty for the other.[3] (PCR Tr. 233). Wafer said that she was "a little fuzzy on the facts," but that she recalled that Stephen Rainwater's murder happened outside and that he was alone, and that the facts of Deborah Rainwater's murder were "a little different." (PCR Tr. 234). That answer concluded Wafer's testimony, and the motion court remarked that the foreman of the jury had volunteered some years after the trial that the reason Appellant had been given death for Deborah Rainwater's murder was because the jury was offended by the fact that she was holding a baby

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[3] *See* Point X of Appellant's Brief and the response to that point in this brief.

when she was shot. (PCR Tr. 234-35). Post-conviction counsel objected to the insertion of that statement into the record and the motion court stated that it was not taking that into consideration in its decision of the case, but just wanted to explain for Wafer's benefit why the jury did what it did, according to the foreman. (PCR Tr. 235). The court reiterated in its written findings that it did not consider the information obtained from the foreman in making any decision about the case, but just provided the information to Wafer to help her understand the jury's verdict. (PCR L.F. 193).

B. Standard of Review.

While it is generally beneficial for the trial judge to consider post-conviction hearings, principles of fundamental fairness may require disqualification in some circumstances. *Edwards v. State*, 200 S.W.3d 500, 521 (Mo. banc 2006). Disqualification is required where there is an objective basis upon which a reasonable person could have a doubt about the impartiality of the court. *State v. Smulls*, 935 S.W.2d 9, 26 (Mo. banc 1996). The objective basis providing a disqualifying bias or prejudice must be one emanating from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learns from participation in the case. *Haynes v. State*, 937 S.W.2d 199, 202 (Mo. banc 1999). It is presumed that a judge acts with honesty and integrity and will not preside over a trial in which he cannot be impartial. *Worthington v. State*, 166

S.W.3d 566, 579 (Mo. banc 2005). This Court reviews the motion court's determination as to whether disqualification is required for an abuse of discretion. *Edwards*, 200 S.W.3d at 521.

C. Analysis.

Appellant claims that the motion court's comments and actions that are set forth above created an appearance that he had prejudged the mental health issues in the Rule 29.15 case. Appellant also claims that the motion court's "bias" comes from an extrajudicial source, namely the court's conversations with the jury foreman from the first trial.

The court's comments at the hearing on the motion for additional testing form part of Appellant's claim. The court's initial question, "Haven't we been down this road before," does not facially establish any sort of prejudgment. It appears instead, to simply be a request for clarification as to why additional testing was needed in light of the evaluations Appellant had undergone for his previous trial. The court's subsequent statements that the mental health evidence presented at the first trial had been discredited and that it did not "buy" that additional testing was necessary did not require the court to disqualify itself. Opinions and beliefs that a judge forms about a party, the party's claim or legal position or counsel that arise from hearing a case are completely natural and not improper, and are not a disqualifying appearance of impropriety. *Davis v. Schmidt*, 210 S.W.3d 494, 520 (Mo. App.

W.D. 2007). "'[I]n pretrial matters, a judge cannot avoid forming and giving expression to tentative opinions on the issues based upon what he has before him. However, such an opinion is not a fixed opinion and the judge can approach the issue with an entirely open mind, putting aside his tentative preliminary opinion and ruling fairly . . . .'" *In re C.N.H.*, 998 S.W.2d 553, 560 (Mo. App. S.D. 1999) (quoting *Blando v. Reid*, 886 S.W.2d 60, 65 (Mo. App. W.D. 1994)).

In *State v. Hunter*, the trial court in a capital murder case made disparaging comments about the Minnesota Multiphasic Personality Inventory and about the practice of psychiatry. *State v. Hunter*, 840 S.W.2d 850, 866 (Mo. banc 1992). This Court found that those comments did not establish a disqualifying bias. *Id.* The motion court's skepticism in this case about the efficacy of mental health evidence was based on the jury's rejection of that evidence in the first trial. An impersonal prejudice resulting from background experience is insufficient to require disqualification. *Id.* And despite its reservations about the efficacy of the mental health evidence presented in the first trial, the court did grant the motion allowing Appellant to be transported for the additional testing. *See Graham v. State*, 11 S.W.3d 807, 814 (Mo. App. S.D. 1999) (court's critical remarks at bond reduction hearing did not establish disqualifying bias, particularly since court granted the motion for bond reduction). There is nothing in the record to suggest that

the court would not have given fair consideration to any test results supporting any of Appellant's mental health claims.

Appellant argues that the court's comments and findings about mental health evidence throughout the course of the 29.15 proceedings were formed through its conversations with the jury foreman from the first trial and thus came from an extrajudicial source, requiring disqualification. However, a court's *ex parte* communications do not require disqualification when the record demonstrates that the court's decisions were based on the law and facts of the case, and not on the content of those communications. *Grissom v. Grissom*, 886 S.W.2d 47, 56-57 (Mo. App. W.D. 1994). The record in this case demonstrates that the motion court's rulings were based on proper considerations.

The court was careful to note that it did not take the foreman's statements as the views of the entire jury, but instead treated them as the foreman's personal views of the evidence. (PCR Tr. 13-14). The court made clear in its findings rejecting the 29.15 claims that it found the mental health evidence presented at the first trial to have been discredited based on the jury's verdict. (PCR L.F. 186). No mention was made of the foreman's comments that the mental health evidence had been "pretty well trashed," and such a comment would reasonably appear to an observer to be nothing more than a confirmation of what was already obvious in light of the verdict

from the first trial. The only reference to the foreman in the 29.15 findings was when the court reiterated what it stated at the 29.15 evidentiary hearing – that the reason for bringing up the foreman's comments at that hearing was to explain to direct appeal counsel the disparate sentences given by the jury for the two murders.[4] (PCR L.F. 193). The court stated at the 29.15 hearing, and again in the judgment, that it did not take the foreman's comments into consideration in deciding any issues in the case. (PCR Tr. 235; PCR Tr. 193). The record demonstrates that the court based its decisions on the facts and the law before it, including the events that transpired during the course of the two previous trials, and not on the basis of any information obtained through out-of-court conversations. The court's credibility findings about the experts were clearly based on the court's own observations of those experts during the various proceedings and its weighing of their testimony against the other evidence presented in those proceedings.

Appellant also complains about the court presenting post-conviction counsel with a copy of a New Yorker magazine article featuring quotes from

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[4] In fact, one of the trial counsels had earlier speculated that the reason for the different sentences was because Deborah Rainwater was holding the baby, and the motion court did not bring up the foreman's comments to that counsel. (PCR Tr. 317).

Dr. Lewis. To a reasonable outside observer, that action would not appear to be the nefarious act that Appellant tries to make it. It objectively appears as a simple matter of the court sharing with counsel an item that the court could reasonably think that counsel would be interested in, namely an article in a national publication that prominently featured an expert witness that counsel was using in her case. There is nothing about that incident that remotely indicates bias or prejudgment, and the use of it as a grounds for disqualification is making the proverbial mountain out of a molehill.

A court's remarks at sentencing that the defendant deserved the death penalty and another court's statement in a Rule 29.15 judgment that the defendant was clearly guilty have been insufficient to show that the court could not impartially consider the claims raised in the 29.15 motion. *State v. Simmons*, 955 S.W.2d 729, 744 (Mo. banc 1997), *see also*, *Haynes*, 937 S.W.2d at 204 (words of reprobation at sentencing do not establish disqualifying bias against presiding over post-conviction proceeding). The remarks Appellant complains of do not rise to even that level, and he has failed to overcome the presumption that the motion court would not undertake to preside in a trial in which it could not be impartial. *In re C.N.H.*, 998 S.W.2d at 553. Appellant's point should be denied.

II.

Counsel made a reasonable strategic decision not to present evidence of past violent and abusive behaviors of Appellant's stepfather (responds to Appellant's Points II and III).

In his second and third points, Appellant claims that trial counsel was ineffective for not presenting testimony by Dr. Lewis about the affects on Appellant of violent and abusive behaviors by his stepfather, Robert Smith, and for not presenting the testimony of Robert Smith's ex-wife, Earline Smith, about violent and abusive behaviors inflicted on her and her daughter by Robert Smith. Because the two claims are interrelated, Respondent will address them in a single point. The testimony of counsel at the 29.15 hearing shows that they made a considered, and reasonable, decision not to present that evidence but to instead pursue a different evidentiary course that included presenting Robert Smith as a person who cared for Appellant and wanted to see him spared the death penalty.

A. Underlying Facts.

The amended 29.15 motion alleged that counsel should have called Earline Smith to testify that Robert Smith frequently beat her during their

marriage,[5] that he was unfaithful and had numerous affairs, that he was verbally abusive to their children, and that he frequently engaged in angry outbursts where he broke numerous physical objects. (PCR L.F. 50-52). The motion claimed that had the jury heard that evidence, there was a reasonable probability that it would have believed that Appellant was subjected to violence and inappropriate behavior by Robert Smith up to the time of the charged crime. (PCR L.F. 52).

The motion contained a separate claim that counsel was ineffective for failing to call Dr. Dorothy Lewis to testify about Appellant's mental health. (PCR L.F. 61). The motion alleged that Dr. Lewis would have testified that it was highly unlikely that Robert Smith's violent behavior towards Earline Smith would have changed at the time he was living with Appellant and his mother and sister. (PCR L.F. 125).

Trial co-counsel Beth Davis-Kerry testified at the Rule 29.15 hearing that she had been employed with the Missouri State Public Defender System for almost twenty-three years at the time of the hearing, had worked on

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[5] The motion alleged that they were married on May 29, 1970 and remained legally married for eleven years, but separated in December 1973. (PCR L.F. 51).

capital cases since 1994, and had been involved in over sixty capital cases, about two dozen of which had gone to trial. (PCR Tr. 237, 313).

Davis-Kerry said that she had received information from the file put together for Appellant's first trial that Robert Smith had been violent in his past towards Earline Smith. (PCR Tr. 250-51). Davis-Kerry said that she traveled to Earline Smith's home and spent a couple of hours interviewing Smith, who told about several incidents of abuse she experienced at the hands of Robert Smith, including an incident that Earline Smith characterized as rape. (PCR Tr. 251-53). Davis-Kerry also knew that Robert Smith had an arrest record and had incidents of violence or aggression towards others when Appellant was young. (PCR Tr. 258). She said that the trial team considered using the information about Robert Smith to create the inference that Appellant experienced a violent childhood home, but decided not to pursue a defense that Appellant was a victim of violent childhood. (PCR Tr. 260, 271-72, 340-41). Davis-Kerry said the reason for that was because Robert Smith was the only family member that was cooperative with counsel and was the one who showed the most emotion about Appellant and his situation. (PCR Tr. 253, 271-72). She also said that Appellant had never admitted to experiencing any violence at the hands of Robert Smith despite being asked directly about that. (PCR Tr. 253, 272). Davis-Kerry said that

counsel had discussed the pros and cons of calling Earline Smith before deciding not to call her. (PCR Tr. 255).

Co-counsel Sharon Turlington testified that she had been employed with the Eastern Capital Ligitation Division of the Missouri State Public Defender System since 1997. (PCR Tr. 357). Turlington testified that she had worked on between thirty and fifty capital cases, and had actually gone to trial on fourteen of those cases. (PCR Tr. 423-24).

Turlington also testified to meeting with Earline Smith, who provided information that Robert Smith was extremely abusive towards her when they were married. (PCR Tr. 370). Turlington testified that Robert Smith was the only family member who was willing to testify for Appellant and who showed any emotion. (PCR Tr. 370). She noted that all of the family members were denying that Robert Smith was abusive or violent in any way. (PCR Tr. 371). Turlington said that counsel made a decision to portray Robert Smith in a good light and to portray Appellant as a good person with a good family, and that the murders were "an abhorrent act on his part."[6] (PCR Tr. 371).

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[6] Given the context of Turlington's testimony, it appears that she was trying to express that the murders were out of character for Appellant. Given that, counsel for Respondent questions whether Turlington actually said, or intended to say, aberrant instead of abhorrent.

Turlington said that she had considered background information about Robert Smith, including reports indicating that he had been involved in violent incidents when Appellant was young, but decided not to present that evidence:

> A. I think there were a couple of reasons. One was just that in our personal interactions and our personal interviews with Robert Smith, and I don't mean to say whether or not he's an abuser or not. I'm just saying that in terms of talking to him, in dealing with him, he comes across as very well and is a very nice person. He's articulate, and he was able to articulate his feelings for Terrance in an emotional and meaningful way, which no one else could really do that.
>
> Q. Terrance's mom could not do that?
>
> A. No. And neither could his sister. Given that we felt that it was very important to present Robert in that light because it was, he was the most compelling family member, and given that Terrance, Shaneka and Linda[7] all denied any of the violent behavior going on in their home, we didn't really feel that it would be in Terrance's best interest to present that information.

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[7] Shaneka and Linda are Appellant's sister and mother, respectively.

> And in the past, sometimes it is not that compelling to a jury, especially if you don't have a lot of really concrete information about what happened in the home and without a really strong link between that prior violent behavior and what happened in the incident.

(PCR Tr. 384-85).

Dr. Lewis's testimony was admitted by deposition. (PCR L.F. 4; Movant's Ex. FF). She testified that she reviewed various records relating to Robert Smith in preparing an evaluation of Appellant prior to the first trial, and that she interviewed Earline Smith and her daughter Deborah. (Movant's Ex. FF, p. 19, 36-45). Dr. Lewis testified that the behavior of a parent had an effect on a child, and it would be unlikely that a person with the duration and degree of violence reflected in Robert Smith's records would change their behavior entirely. (Movant's Ex. FF, pp. 35, 46). She said that while the family denied any violence, Appellant told her that he sometimes had to come between his parents. (Movant's Ex. FF, p. 46). Based on that, Dr. Lewis said, "So, of course, there was violence at home." (Movant's Ex. FF, p. 46). Dr. Lewis testified that Appellant and his sister had reported only one specific incident of violence, where Robert Smith overturned a table and smashed a chandelier after learning that Appellant had eaten a Cornish game hen that Robert had been saving for himself. (Movant's Ex. FF, p. 48).

Dr. Lewis admitted on cross-examination that she could not recall Appellant describing any physical violence between Robert Smith and his mother, though she characterized the incident of turning over the table and throwing things as physical violence directed towards Appellant's mother. (Movant's Ex. FF, pp. 94-95). Dr. Lewis also said that she was unaware of Robert Smith ever spanking or laying hands on Appellant, and said that he seemed to limit his violence towards adults. (Movant's Ex. FF, p. 95).

Earline Smith was not called as a witness, but the parties submitted a stipulation as to her testimony had she testified in the post-conviction case. (PCR L.F. 3; Movant's Ex. GG). The stipulation stated that Smith would have testified at trial that Robert Smith frequently beat her during their marriage, including in front of their children, that he repeatedly injured her shoulder necessitating surgery, that he raped her on more than one occasion, that he twisted her breast after she had surgery on it, that he broke household items, that he had numerous affairs, and that he stalked her and threatened to hurt her. (Movant's Ex. GG).

In its findings, the motion court noted that there was no evidence that Appellant witnessed, or was aware, of any of the violent actions of Robert Smith that Earline Smith would have testified to, or that were contained in any of the records relating to Robert Smith. (PCR L.F. 201, 202). The court concluded that the idea that Appellant "probably" saw violence by Robert

Smith and was "possibly" traumatized was obvious speculation and would be readily recognized as such by every rational juror. (PCR L.F. 201).

B. Analysis.

Reasonable choices of trial strategy, no matter how ill-fated they appear in hindsight, cannot serve as a basis for a claim of ineffective assistance. *Anderson II*, 196 S.W.3d at 33. Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable. *Id.* Where counsel has investigated possible strategies, courts should rarely second-guess counsel's actual choices. *Id.* It is not ineffective assistance of counsel to pursue one reasonable trial strategy to the exclusion of another reasonable trial strategy. *Id.*

The record of the Rule 29.15 evidentiary hearing shows that counsel investigated and considered a possible mitigation strategy that Appellant suffered a violent childhood, but decided instead to pursue a different reasonable strategy. In *Edwards* this Court found that counsel's decision to forgo presenting evidence of the defendant's traumatic childhood in favor of presenting him as a contributing member of a loving family was a reasonable trial strategy. *Edwards*, 200 S.W.3d at 516-17. The Court found counsel's choice to not present evidence of the defendant's childhood to be reasonable even though counsel had evidence that the defendant was beaten by his father, who also had abused the defendant's mother to some extent. *Id.*

Despite having that information, the defense presented penalty phase testimony similar to that presented in this case: that the defendant loved his family, treated his co-workers and tenants well, was close to and loved by his family, that he was close to and had a good relationship with his father, and was a good parent. *Id.* at 505.

In *Edwards*, the Court distinguished three cases cited by the defendant that Appellant also relies on in this case. The Court noted that *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005), involved situations where defense counsel failed to conduct an adequate investigation into the existence of mitigating evidence.[8] *Edwards*, 200 S.W.3d at 517. By contrast, trial counsel in *Edwards* had conducted an adequate investigation. *Id.* Appellant's counsel likewise investigated potential evidence of Robert Smith's abusive background testimony before strategically deciding not to present that evidence. Furthermore, the records that defense counsel failed to discover in the cases relied on by Appellant contained concrete information that the defendant had actually been abused. *Wiggins*, 539 U.S. at 516-17; *Williams*,

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[8] The other two cases cited by Appellant also involved inadequate investigation by counsel. *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009); *Griffin v. Pierce*, 622 F.3d 831, 838 (7th Cir. 2010).

529 U.S. at 370; *Rompilla*, 545 U.S. at 391-92; *Porter*, 130 S. Ct. at 449; *Griffin*, 622 F.3d at 844-45.

Unlike *Edwards* and the cases relied on by Appellant, the record in this case contains no evidence directly establishing that Appellant actually suffered abuse at the hands of Robert Smith or witnessed abuse directed towards others. Earline Smith would have testified primarily to acts that happened before Appellant was born, and she had no knowledge of anything Robert Smith did in Appellant's presence. Dr. Lewis could only surmise that because Robert Smith had engaged in violent behaviors towards others that he must have also acted violently in front of Appellant. In fact, Dr. Lewis was only able to identify one incident of violent behavior that Appellant witnessed, and that violence was directed towards inanimate objects and not towards Appellant or any other member of his family. Appellant denied that Robert Smith was violent or abusive when questioned about that by counsel. Given the tenuousness of the "evidence" that Appellant suffered a violent childhood, it is not reasonably likely that such evidence, when weighed against the evidence in aggravation, would have swayed the jury's verdict.

The Supreme Court also noted in *Porter* and *Rompilla* the relative weakness of the mitgation cases that were presented, stating in one case that the jury heard almost nothing that would humanize the defendant, and describing the mitigation evidence in another case as consisting of a "few

naked pleas for mercy." *Porter*, 130 S. Ct. at 454; *Rompilla*, 545 U.S. at 393. Unlike those cases, defense counsel here presented an extensive mitigation case that did contain information humanizing Appellant. *See Anderson III*, 306 S.W.3d at 549 (Wolff, J., dissenting) (describing mitigation evidence as significant). Counsel is not deemed ineffective simply because the case they chose to present proved unsuccessful. *See Strickland*, 466 U.S. at 689 ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.").

Finally, Appellant makes much of the fact that counsel testified at the Rule 29.15 hearing that they wanted to take a different approach than had been taken in the first trial, but that they followed the same strategy in regards to Robert Smith. (PCR Tr. 272, 320-21, 335-36, 374). While co-counsel Davis-Kerry may have said at one point she thought (mistakenly as it turns out) that some of that kind of evidence was introduced at the first trial, that does not make counsel's chosen strategy unreasonable.[9] (PCR Tr. 272).

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[9] The record does not establish whether she held that mistaken belief while she was preparing for trial, or if she only held it at the time of the Rule 29.15 hearing.

There is no requirement that counsel in a retrial situation must take an entirely different approach from the previous trial, and co-counsel Kerry-Davis testified that she and co-counsel Turlington were not taking an approach of "let's pick something different and see if it works." (PCR Tr. 336). She and Turlington both testified that they put on the defense they believed would be most effective in avoiding a death sentence for Appellant. (PCR Tr. 336, 385). Turlington testified that, based on her experience, presenting evidence of a defendant's traumatic and violent childhood had not been a particularly persuasive mitigating factor, and she took that experience into account when determining a trial strategy. (PCR Tr. 425-26).

Appellant also cannot show prejudice. Because the evidence suggesting a troubled childhood is so conjectural, a finding that it would have been reasonably likely to change the jury's sentencing decision has to be characterized as pure speculation.

Counsel made a reasonable strategic decision following an adequate investigation, and their choice does not give rise to a finding of ineffective assistance of counsel. Appellant also cannot show a reasonable probability of a different sentence had evidence of his childhood been presented. Appellant's points should be denied.

III.

Counsel made a reasonable strategic choice not to present expert mental health testimony (responds to Appellant's Points IV and V).

In Points IV and V of his brief, Appellant claims that trial counsel was ineffective for failing to call Drs. Lewis and Holcomb to testify that Appellant suffered from a psychotic depression characterized by paranoia and delusions. Because the two claims are interrelated, Respondent will address them in a single point. Appellant is not entitled to relief because the record shows that counsel made a reasonable strategic decision to use Dr. Holcomb instead of Dr. Lewis, and made an equally reasonable decision not to call Dr. Holcomb after Appellant admitted that he had lied about his partial amnesia for the shootings that had formed part of the basis for Dr. Holcomb's diagnosis.

A. Underlying Facts.

Both sides presented mental health testimony at the guilt phase of Appellant's first trial. *Anderson I*, 79 S.W.3d at 429. Appellant's evidence included the testimony of psychiatrist Dr. Dorothy Lewis, who testified that Appellant could not deliberate on the day of the murders because he was suffering at the time from a combination of severe depression and extreme paranoia. *Id.*

The amended 29.15 motion alleged that trial counsel were ineffective for failing to call Drs. Lewis and Holcomb to testify about Appellant's mental health. (PCR L.F. 61, 68). The motion alleged the testimony of the two doctors would have provided evidence of statutory and non-statutory mitigating circumstances, and that there was a reasonable probability of a different result had they testified. (PCR L.F. 65-66, 71).

Co-counsel Davis-Kerry testified at the 29.15 hearing that the trial team planned to present mental health evidence but was trying to pare down the amount of that evidence as compared to the first trial. (PCR Tr. 317). She testified that, based on her experience, it was not beneficial to put on a parade of psychological experts. (PCR Tr. 336). Counsel retained Dr. Lewis because she had previously done work on the case. (PCR Tr. 297). Davis-Kerry said that, at Dr. Lewis's request, she re-sent all the records in the case. (PCR Tr. 303). That was followed by a phone consultation with Dr. Lewis, whose opinions and diagnosis remain unchanged from the first trial. (PCR Tr. 304). Davis-Kerry testified that she and co-counsel made the decision not to call Dr. Lewis, but to instead call forensic psychologist Dr. William Holcomb, who had reviewed Dr. Lewis's reports and was in agreement with her opinions and diagnoses. (PCR Tr. 304, 306).

Davis-Kerry testified that Dr. Holcomb had evaluated Appellant in 2001 and testified at a competency hearing held between the guilt and

penalty phases of the first trial. (PCR Tr. 307). After being retained by counsel for the penalty phase retrial, Dr. Holcomb met with Appellant again and diagnosed him with major depression, psychotic paranoia at the time of the murders. (PCR Tr. 307). Counsel brought Dr. Holcomb from California to Cape Girardeau for the penalty phase retrial. (Tr. 308-09). Davis-Kerry testified that Appellant told co-counsel Turlington during the testimony of a State's witness that he remembered everything about the shootings and had lied when he earlier said that he did not remember. (PCR Tr. 309). Counsel met with Appellant at the jail after the trial recessed for the day, and discussed what he had revealed. (PCR Tr. 310). The decision was made after that conversation that Dr. Holcomb would not be called as a witness. (PCR Tr. 312-13). Davis-Kerry explained the decision by saying, "I'm not going to put on an expert who is endorsing or has previously endorsed a diagnosis that contains, among other things, that contains amnesia about the murder of Debbie Rainwater when my client is, in fact, saying he remembers everything about it." (PCR Tr. 327). Davis-Kerry said that discrepancy "would have taken all credibility away from anything else that Dr. Holcomb said." (PCR Tr. 327).

Co-counsel Turlington similarly testified that Dr. Lewis was retained because she had worked on the first trial and was familiar with the facts of the case. (PCR Tr. 404-05). Turlington also testified that near the beginning

of trial preparation, she and Davis-Kerry decided to go with the testimony of one doctor, and the decision was made to have Dr. Holcomb build on what Dr. Lewis had done. (PCR Tr. 411). Turlington noted that Dr. Holcomb had prepared an addendum to his report in which he indicated his agreement with the opinions expressed by Dr. Lewis in her report. (PCR Tr. 411). Turlington also testified that Dr. Holcomb was in Cape Girardeau preparing to testify when Appellant admitted that he had lied about having no memory of Deborah Rainwater's murder. (PCR Tr. 416). Turlington said that part of what Dr. Holcomb was going to testify to was about Appellant having psychogenic amnesia, and the fact that Appellant had been lying about his memory for eleven years would be extremely bad information to have come out in front of the jury. (PCR Tr. 416-17). Turlington testified that even though it was Dr. Holcomb's opinion that Appellant was not malingering his amnesia, evidence that Appellant suddenly admitted remembering the events after eleven years would have undercut the value of Dr. Holcomb's testimony. (PCR Tr. 417, 422).

She also noted that while Dr. Holcomb could have testified instead of Appellant, Appellant wanted to testify. (PCR Tr. 421). Turlington further testified that Appellant's previous position of remembering some things but not others made him look bad, but his later admission to remembering everything seemed more truthful. (PCR Tr. 421). Turlington said that not

putting Dr. Holcomb on the stand meant that counsel did not have to explain the psychogenic amnesia and why Appellant only remembered the events that did not make him look as bad. (PCR Tr. 421). Turlington said she believed it was more beneficial to have Appellant testify than Dr. Holcomb. (PCR Tr. 421, 423). Turlington said that after a long discussion during the overnight recess, the decision was made to not have Dr. Holcomb testify. (PCR Tr. 416-17).

Dr. Holcomb testified that he originally evaluated Appellant in 2001 and diagnosed him with major depression, psychogenic amnesia, personality disorder not otherwise stated with characteristics of paranoia, and alcohol and substance abuse. (PCR Tr. 45, 50). Dr. Holcomb re-interviewed Appellant in May and October of 2008 and formed the opinion that Appellant, at the time of the murders, was under severe emotional distress and suffered from delusional paranoia and major depression. (PCR Tr. 55). Dr. Holcomb testified that Appellant continued to maintain in the 2008 interviews that he could not remember shooting Deborah Rainwater, even as he acknowledged shooting Stephen Rainwater. (PCR Tr. 54).

Dr. Holcomb said that he was in Cape Girardeau and ready to testify when he got a call from one of the attorneys saying that he would not be needed. (PCR Tr. 56). He said that the attorney indicated that Appellant was going to testify and acknowledge that he remembered killing Deborah

Rainwater. (PCR Tr. 57). Dr. Holcomb said he was not asked if that testimony would change his opinion. (PCR Tr. 57). Dr. Holcomb said that his testimony probably would not have changed. (PCR Tr. 57). He said that Appellant could have started remembering after many retellings of what happened. (PCR Tr.58). Dr. Holcomb also said that Appellant may have had motivations to say that he remembered, but that did not necessarily mean he actually remembered. (PCR Tr. 58). Dr. Holcomb said that his opinion as of the date of 29.15 hearing was that Appellant probably could not remember. (PCR Tr. 59). Dr. Holcomb said that if he had been called to testify, his opinions about Appellant's mental state at the time of the murders would not have changed. (PCR Tr. 60).

Dr. Lewis testified by deposition that in the days leading up to the shooting, Appellant was becoming obsessed with the thought that the Rainwaters were going to deprive him of all contact with his daughter. (Movant's Ex. FF, p. 62). She also said that Appellant confessed to shooting Stephen Rainwater, but insisted he had not shot Deborah Rainwater. (Movant's Ex. FF, pp. 64-65). Dr. Lewis diagnosed Appellant with depression and said that he was under extreme mental disturbance at the time of the murders. (Movant's Ex. FF, pp. 69-70). She also expressed the opinion that Appllant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired

because he was delusional and was misperceiving what was going on around him. (Movant's Ex. FF, p. 70). Dr. Lewis said there were a couple of possibilities for Appellant's trial testimony where he remembered shooting Deborah Rainwater. (Movant's Ex. FF, p. 71). One explanation was that some of his memories did come back. (Movant's Ex. FF, p. 72). Dr. Lewis said an equally plausible explanation was that he pieced together the events from what he had heard from others about what happened. (Movant's Ex. FF, p. 72). Dr. Lewis said that Appellant's retrial testimony did not change her opinions about his mental state at the time of the offense. (Movant's Ex. FF, p. 73). She said that she would have testified to those opinions if called as a witness at the 2008 retrial. (Movant's Ex. FF, p. 74).

In denying the claims, the motion court found that because both doctors reported amnesia and dissociation behavior, they could not alter their conclusions without being impeached irreparably. (PCR L.F. 204). The court further found that it would have been "foolish of counsel" to have the doctors take the stand to assert their conclusions of amnesia, after the jury heard Appellant give an account of the events. (PCR L.F. 204). The court stated that counsel had difficult strategic decisions to make under stressful circumstances and did an outstanding job given the suprises they were required to deal with. (PCR L.F. 204). The court also determined that it was unnecessary to address whether counsel could have ethically put the mental

health experts on the stand knowing that the basis of their opinions were predicated on a fabrication by Appellant. (PCR L.F. 204-05).

B. Analysis.

Trial counsel's selection of which expert witnesses to call at trial is generally a question of trial strategy and is virtually unchallengeable. *McLaughlin v. State*, 2012 WL 2861374 at *10 (Mo. banc, Jul. 3, 2012). Counsel's testimony at the 29.15 hearing reflects a clear trial strategy – to use a single expert to provide mental health testimony at the trial rather than calling a parade of experts. That choice is objectively reasonable, especially since Drs. Lewis and Holcomb would have provided substantially identical testimony. *Id.* Appellant has asserted no impropriety in the initial selection of Dr. Holcomb over Dr. Lewis to testify about their shared mental health diagnoses. *State v. Kenley*, 952 S.W.2d 250, 268 (Mo. banc 1997).

Counsel was unexpectedly forced to rethink the decision to call Dr. Holcomb after Appellant surprised them during trial by admitting that he really did remember shooting Deborah Rainwater, an event he had denied remembering for the previous eleven years. Counsel decided that admission by Appellant would conflict with Dr. Holcomb's opinion that Appellant suffered from psychogenic amnesia and would diminish the effectiveness of Dr. Holcomb's testimony. Counsel determined that it was more important for

the jury to hear from Appellant than from Dr. Holcomb and decided, after due consideration, not to call Dr. Holcomb.[10]

When defense counsel believes that a witness's testimony will not uequivocally support his client's position, it is a matter of trial strategy not to call him, and the failure to call such a witness does not constitute ineffective assistance of counsel. *Winfield v. State*, 93 S.W.3d 732, 739 (Mo. banc 2002). Counsel recognized that Dr. Holcomb's testimony about psychogenic amnesia would have conflicted with Appellant's testimony that he remembered shooting Deborah Rainwater. Counsel is not ineffective for choosing not to put on contradictory testimony. *Ringo v. State*, 120 S.W.3d 743, 749 (Mo. banc 2003). Although Dr. Holcomb disputed whether Appellant's memory of the shooting was genuine, and stated that he would have so testified at the trial, counsel could reasonably believe that the jury would not find that testimony convincing, especially since their substantial experience in trying

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[10] Counsel was not in a position where they could simply choose to call Dr. Holcomb instead of Appellant. The decision whether to testify rests with the defendant and not with counsel. *Rousan v. State*, 48 S.W.3d 576, 585 (Mo. banc 2001). Co-counsel Turlington said that Appellant had expressed a desire to testify at the point when a decision had to be made whether to call Dr. Holcomb. (PCR Tr. 421).

capital cases had demonstrated that juries are not always receptive to expert mental health evidence. (PCR Tr. 318-19). Counsel was not unreasonable in believing that the benefits of Dr. Holcomb's testimony would be undercut by opening the door to evidence that Appellant was suddenly claiming a complete memory for the shootings after having denied such a memory for eleven years. (PCR Tr. 422-23). *See Taylor v. State*, 126 S.W.3d 755, 762 (Mo. banc 2004) (finding that counsel reasonably determined that adverse aspects of expert's testimony might outweigh the usefulness of other testimony).

Appellant also cannot demonstrate prejudice. The revelation that Appellant had lied for eleven years in an attempt to minimize his responsibility for Deborah Rainwater's murder would play into the very concerns that cause some jurors to view mental health evidence as aggravating, rather than mitigating. *See* Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 239, 258-59 (1994) (noting that many jurors bring into their deliberations "the omnipresent obsessive fear of feigned mental states," causing them to view mental health evidence as aggravating). Jurors inclined towards such views would be extremely skeptical about any attempts by an expert to explain

away the sudden confession of memory and would likely disregard the entirety of that expert's testimony.

Furthermore, significant mental health testimony was presented in the guilt phase of the first trial, the jury was instructed that it could consider that evidence in the sentencing phase, and the statutory mitigators were submitted that asked the jury to determine whether Deborah Rainwater's murder was committed while Appellant was under the influence of extreme mental or emotional distress and whether Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (SC83680 L.F. 1016, 1018). Despite all that evidence, the first jury returned a death verdict for Deborah Rainwater's murder. (SC83860 L.F. 1037). There is no reason to believe that the presentation of mental health evidence in the retrial would have led to a different result.

Counsel made a considered and informed strategic decision to pursue one evidentiary course over another. Counsel is not ineffective for making such a choice. *Ringo*, 120 S.W.3d at 749. Appellant also cannot demonstrate a reasonable probability of a different sentence had counsel called either of the doctors. Appellant's points should be denied.

IV.

Counsel were not ineffective for deciding not to present evidence of Appellant's apparent mental state near the time of the murders (responds to Appellant's Point VI).

Appellant claims that trial counsel were ineffective for failing to call a number of lay witnesses to testify that Appellant appeared to be in a disoriented, distressed state before and after the murders. But some of the witnesses were uncooperative and none of them would have offered compelling testimony that would have changed the outcome of the trial.

A. Underlying Facts.

The amended 29.15 motion alleged that counsel was ineffective for failing to elicit additional mitigation evidence from a number of witnesses. (PCR L.F. 35). The witnesses that counsel allegedly should have called included Tim Jones, Dionne (Adrienne) Moore Harris Webb, Larry Woods, and Steven Antwon "Lamont" Stovall. (PCR L.F. 40, 44, 45, 48). All four of those persons testified at the 29.15 hearing. (PCR Tr. 2-3).

1. Timothy Jones.

Tim Jones had known Appellant since they were both about ten years old. (PCR Tr. 142). They lived a few blocks from each other. (PCR Tr. 142). He described Appellant as shy and a bit of a nerd. (PCR Tr. 144). Jones said that he had never seen Appellant act crazy or get into a fight. (PCR Tr. 144).

Jones and Appellant were also co-workers at a furniture store after they finished school. (PCR Tr. 144). Appellant lost his job there in December of 1996, but Jones continued to see him. (PCR Tr. 146-47).

Jones said that he saw changes in Appellant after he lost his job and after his daughter was born in April of 1997. (PCR Tr. 147). Jones testified that when they went out on the weekends, Appellant would sometimes sit in a daze. (PCR Tr. 148). When asked, Appellant denied that anything was wrong. (PCR Tr. 148). Appellant also made statements that the Rainwaters were trying to keep him away from his daughter. (PCR Tr. 149). Jones met with members of the defense team from Appellant's first trial and told them about the changes he saw in Appellant. (PCR Tr. 149-50). Jones was not contacted about testifying at the retrial. (PCR Tr. 150-51). His cousin, Louis Buchanan, did testify as a defense witness. (PCR Tr. 151; Tr. 4). Jones said that Buchanan probably saw the same things that he did. (PCR Tr. 154). Jones said that he would have testified at the retrial and would have given the same testimony as he did at the 29.15 hearing. (PCR Tr. 153).

Mitigation specialist Catherine Luebbering worked on Appellant's case from November of 2007 until October of 2008. (PCR Tr. 159-60). She testified that she tried to contact Jones when she was in Poplar Bluff, but had no luck locating him. (PCR Tr. 164). Co-counsel Davis-Kerry testified that she could not recall whether she met with Jones or not. (PCR Tr. 239).

She did say that she talked with Jones's cousin, Louis Buchanan, and some other people that Appellant knew who had described him as not acting normal. (PCR Tr. 296). Co-counsel Turlington testified that she had no independent recollection of contacting Jones and could not remember whether Luebbering contacted him. (PCR Tr. 360). Turlington testified that whatever efforts were made to contact Jones never panned out, and counsel eventually felt that they had enough witnesses presenting the same type of information, so no further attempts were made to locate him. (PCR Tr. 361-62). Turlington said that it was not a case of affirmatively telling Luebbering to stop looking for him, so much as not giving her affirmative directions to find him. (PCR Tr. 362-63).

In denying the claim, the motion court found that Jones's purported testimony was not compelling, was very general in nature, and was very much like that given by Louis Buchanan and Linda Smith. (PCR L.F. 199). The court also noted that Movant's Exhibit AA was a memorandum from the public defender's investigator where Jones related (on Feb. 3, 1999) a statement by Appellant that if the Rainwaters' would not let him see the baby, then they would not see the baby either. (PCR L.F. 191; Movant's Ex. AA). The court found that statement could be deemed ominous by a juror and would not be helpful to the defense. (PCR L.F. 191).

2. Adrienne Webb.

Adrienne Webb testified that she and Appellant had been friends since childhood. (PCR Tr. 346). She testified that Appellant was supportive of her in 1995 while she was pregnant and separated from her husband, that he visited her, played cards with her, and ran errands for her. (PCR Tr. 347). Webb described Appellant as kind of quiet. (PCR Tr. 348). Appellant continued to visit Webb and her husband up through the time of the murders. (PCR Tr. 349). She said that between April and July of 1997, Appellant was no longer relaxed with her. (PCR Tr. 349). She said that his dress became uncharacteristically unkempt, he was cynical and negative, and he was really agitated a lot. (PCR Tr. 349). Appellant told Webb that the Rainwaters did not want him to see his baby. (PCR Tr. 351). Webb also said that Appellant became very negative after he lost his job. (PCR Tr. 352). Webb said that Appellant was in her home for about ten minutes on the day of the murders. (PCR Tr. 352-53). She said that he would not sit down and would not make eye contact. (PCR Tr. 352).

Webb said that she remembered her husband going to a meeting with members of the trial team in 2007. (PCR Tr. 353). Webb said she had undergone surgery in late 2007 or early 2008 that laid her up for a significant period of time. (PCR Tr. 353-54). Webb said that she was not aware that members of the trial team were trying to contact her between late 2007 and

March of 2008. (PCR Tr. 354). Webb said that she would have talked to Appellant's lawyers and would have given the same testimony at trial as at the 29.15 hearing. (PCR Tr. 355).

Mitigation specialist Luebbering testified that she had gone to Webb's house and had unsuccessfully tried to contact Webb through her husband. (PCR Tr. 169-70). Co-counsel Davis-Kerry testified that she and other members of the trial team went to Webb's house and that her husband answered the door, but would not let them in. (PCR Tr. 243). Webb's husband told them to come back the next day. (PCR Tr. 243). They did so, but no one answered the door. (PCR Tr. 243). They left business cards on the door and later sent correspondence, but received no response. (PCR Tr. 243). Co-counsel Turlington echoed Davis-Kerry's testimony about the visit to the Webb's home. (PCR Tr. 365).

In denying the claim, the motion court found that the trial team made reasonable efforts to reach Webb. (PCR L.F. 191, 193). The court also found that Webb's testimony denying that she was avoiding the trial team was not credible. (PCR L.F. 193). The court further found that nothing Webb testified to would have altered the outcome of the trial. (PCR L.F. 200).

3. Larry Woods.

Larry Woods testified that he worked as an investigator for the public defender's office for approximately fourteen years before retiring in

September of 2003. (PCR Tr. 85). A couple of weeks before the murders, Woods served Appellant with a subpoena to be a witness in a misdemeanor case. (PCR Tr. 92). Woods said that he talked to Appellant for twenty to thirty minutes and found him to be a bright, nice young man who was clean cut and real sharp. (PCR Tr. 93). Woods next encountered Appellant a few days after the murders when he went to the jail to take an application from him for public defender services. (PCR Tr. 94-95). Woods said that Appellant could not answer his questions, did not know why he was in jail, and could only talk about his daughter. (PCR Tr. 96). Woods reported to his superiors his concerns about Appellant's mental state. (PCR Tr. 97). He also worked with the trial team for the first trial, and he testified for the defense in that trial. (PCR Tr. 100-01).

Woods said that he was called several times about the retrial. (PCR Tr. 102). He said that someone left a message on his phone and he called them back. (PCR Tr. 102). Woods said that he would have been cooperative with members of the second trial team if they had asked to contact him. (PCR Tr. 103). Woods said he would have testified at the retrial if subpoenaed and would have given the same testimony as at the 29.15 hearing. (PCR Tr. 106).

Co-counsel Davis-Kerry testified that an appointment was made for her to meet with Woods in the Poplar Bluff area, but he did not show up for that meeting. (PCR Tr. 247). Davis-Kerry said that she waited for thirty to forty-

five minutes before being told that no one knew where Woods was or if he was coming back to the meeting location. (PCR Tr. 247). Mitigation specialist Luebbering testified that Woods had contacted her after the missed meeting and that she did not consider Woods to be uncooperative. (PCR Tr. 172-73). But Davis-Kerry testified that Woods was not reachable when the trial team tried to initiate contact and she did not feel that he was cooperative. (PCR Tr. 248). Davis-Kerry was concerned that Woods was "dodging us," and also concerned about why he was not as willing to come forward as he had been during the previous trial. (PCR Tr. 338). Co-counsel Turlington also testified that efforts to contact Woods left her with the feeling that he was intentionally trying to avoid meeting with counsel. (PCR Tr. 367). Turlington said that counsel, to a large extent, ruled out Woods as a witness because he was uncooperative and because they intended to present the substance of his information through Dr. Holcomb. (PCR Tr. 367-68). But she noted that the trial strategy changed dramatically in the middle of the trial and that she did not believe that Woods's information was relevant at that point.[11] (PCR Tr. 366-67).

[11] See Point III, *supra*.

In denying the claim, the motion court stated that it believed the testimony of Davis-Kerry that Woods was not being cooperative and was dodging the defense team. (PCR L.F. 189). The court also noted that Woods's testimony did not persuade the jury in the first trial and would not have persuaded the jury in the retrial. (PCR L.F. 200). The court noted that Woods's former employment with the public defender would have raised an obvious suspicion of bias. (PCR L.F. 200).

4. Steven Stovall.

Steven Stovall testified that he had lived in Poplar Bluff since 1990 and had attended junior high and high school with Appellant. (PCR Tr. 76-78). He described Appellant as "a very good guy" in school who played sports and stayed out of trouble. (PCR Tr. 78). Stovall said that he briefly saw Appellant in the Butler County Jail in August of 1997, when Stovall was brought in on a probation violation. (PCR Tr. 78-79, 82). Stovall said that he tried to talk to Appellant in passing, but he looked absent-minded and did not seem to know what he was in jail for. (PCR Tr. 79, 82). Stovall said that he was taken to his pod in a different part of the jail and had no further interaction with Appellant. (PCR Tr. 79, 82). Stovall said that he would have come to court in November of 2008 and given the same testimony as at the Rule 29.15 hearing. (PCR Tr. 81). On cross-examination, Stovall testified that the probation violation that landed him in jail was for misdemeanor

stealing, and that he was also in jail for contempt of court. (PCR Tr. 82-83). Stovall also admitted to then being on probation following a burglary conviction. (PCR Tr. 83).

Mitigation specialist Luebbering said that she never met Stovall and did not recall any trial team discussion about contacting persons who were in jail with Appellant. (PCR Tr. 174). Co-counsel Davis-Kerry said that she might have followed up with Stovall if she had information about him. (PCR Tr. 249). She declined to speculate on whether she might have called him as a witness. (PCR Tr. 250). Co-counsel Turlington testified that she had no recollection of whether counsel considered contacting anyone who was incarcerated with Appellant. (PCR Tr. 369). She said that if she had been aware of Stovall she would have investigated him and then considered whether or not to use him. (PCR Tr. 369).

In denying the claim, the court found that Stovall saw Appellant for a few seconds in jail. (PCR L.F. 201). The court also noted Stovall's convictions for burglary and stealing. (PCR L.F. 201). The court concluded that counsel was not ineffective for failing to call Stovall. (PCR L.F. 201).

B. Analysis.

Ineffective assistance for failure to call a witness requires a defendant to show: (1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3)

the witness would testify; and (4) the witness's testimony would have produced a viable defense. *Edwards*, 200 S.W.3d at 518. Appellant failed to make the required showing as to the four witnesses named in this point.

The motion court found that the credible evidence showed that two of the witnesses, Adrienne Webb and Larry Woods, were not cooperative and resisted counsel's efforts to contact and interview them. Determining witness credibility in a post-conviction hearing is the responsibility of the motion court. *Rousan*, 48 S.W.3d at 589. An attorney is not ineffective for failing to further investigate or call a witness to testify who is unwilling to do so and who cannot be counted on to give testimony favorable to the defendant. *Clayton v. State*, 63 S.W.3d 201, 208 (Mo. banc 2002). Co-counsel Davis-Kerry testified along those lines at the evidentiary hearing:

> If I'm asking a witness to come in in a penalty phase and present what I call more like character or developmental information and they don't want to do it, I'm less inclined to force them to come in. I'm less inclined to bring them in against their will because they won't be persuasive. They won't give to me the emotion that I want them to give that I want the jury to see in this phase.

(PCR Tr. 320). In *Deck v. State*, this Court recently rejected an ineffective assistance claim where the prospective witness's husband was hostile to counsel's attempts to contact the witness, and where counsel decided to bring

out the substance of the witness's testimony through an expert. *Deck v. State*, 2012 WL 2754211 at *11 (Mo. banc, Jul. 3, 2012). In this case, the uncooperativeness of Webb's husband led counsel to abandon attempts to call her as a witness, and counsel further decided that because of Woods's uncooperativeness, his testimony would be brought into the case through Dr. Holcomb. That choice would also be consistent with the overall trial strategy of streamlining the evidence relating to Appellant's mental health. (PCR Tr. 321). Counsel's decision not to call Webb or Woods was reasonable under the circumstances.

Appellant has not demonstrated that counsel's unsuccessful attempts to locate Tim Jones were unreasonable, or that the decision to stop pursuing Jones as a potential witness in lieu of using other witnesses, including his cousin who did testify, was an unreasonable trial strategy. Appellant further failed to show that counsel knew, or should have known, of Stovall's existence. "'The duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up . . . .'" *Strong v. State*, 263 S.W.3d 636, 652 (Mo. banc 2008) (quoting *Rompilla*, 545 U.S. at 383)). Even if counsel had discovered Stovall, his testimony was far from compelling. He had a brief encounter with Appellant several days, if not weeks, after the shooting. His testimony, as well as that of the other witnesses, was so

general in nature and lacking in substance that it would not have had an impact on the jury's decision. *Deck*, 2012 WL 2754211 at *8.

The motion court also correctly found that Jones, if called to testify, could have been cross-examined about statements he had heard Appellant make that would not have placed Appellant in an unfavorable light. Counsel is not considered ineffective for failing to call a witness whose testimony would open an unfavorable avenue of cross-examination. *Rios v. State*, 368 S.W.3d 301, 307 (Mo. App. W.D. 2012).

The motion court did not clearly err in finding that counsel was not ineffective and that Appellant was not prejudiced. Appellant's point should be denied.

V.

Appellant has not shown that counsel was ineffective for failing to object to the prosecutor's cross-examination, or that the failure to object was prejudicial (responds to Appellant's Point VII).

Appellant claims that trial counsel was ineffective for failing to timely object when the prosecutor asked Appellant on cross-examination whether certain State's witnesses were lying. But Appellant has failed to overcome the presumption that counsel had a strategic reason for not objecting earlier, and he cannot establish a reasonable probability that the few unobjected-to questions changed the jury's sentencing verdict.

A. Underlying Facts.

1. Trial Proceedings.

The prosecutor's cross-examination of Appellant began in the following manner:

> Q. Thank you, Your Honor. So when you went over there on the afternoon of July 25th, Stephen Rainwater called you a coward, is that right?
>
> A. Yes.
>
> Q. That didn't make you mad at the time. You got mad later?
>
> A. I was already mad.

Q. All right. So it did make you mad. It was the truth, wasn't it?

A. I mean, everybody's entitled to their opinion.

Q. Well, men who beat on women are cowards, aren't they?

A. I never beat on a woman.

Q. You never beat on a woman?

A. No.

Q. Okay. So everything that was said about the physical abuse of Abbey Rainwater by you is a lie. Is that what you're saying?

A. The allegations that she made, I did not do those.

Q. Beg your pardon?

A. I did not do those.

Q. All right. So it is a lie. Is that what you're saying?

A. Yes.

Q. All right. That night, why did you go to the Rainwater house at all?

A. I wanted to see, I wanted to see my child.

Q. You had taken a gun to go see a child?

A. No.

Q. You did that night. You took a gun to that house, didn't you?

A. Yes.

Q. To see your child. Sir, it was your purpose to go there to kill somebody, wasn't it?

A. Yes.

Q. All right. So you didn't go there to see your child, did you?

A. I still went to see my child.

Q. And kill somebody, I guess? The fact is, sir, you were losing control of this situation, and you didn't like it, isn't that right?

A. I don't know, I guess you could say that.

Q. And if I understand what you're saying, it was the statements that were repeated to you by then Stacey Turner that really got you to thinking and getting, started getting you angry. Is that right?

A. I mean, I've been thinking about it for a while.

Q. Do you understand that Stacey sat where you're sitting right now yesterday and said she never said any of those things?

A. Yes.

Q. So she is lying on you, too?

A. I don't know what she's doing.

Q. Well, you're saying that's not true so you must be calling her a liar.

MS. KERRY: Judge, I'm going to object at this time.

A. It's a bad situation.

THE COURT: One at a time. Yes, ma'am.

MS. KERRY: My legal objection, commenting on another witness's testimony.

THE COURT: Sustained.

(Tr. 786-88).

2. Rule 29.15 Proceedings.

The amended 29.15 motion contained a claim that counsel was ineffective for failing to object earlier to each of the prosecutor's questions that called for Appellant to comment on the credibility of other witnesses. (PCR L.F. 85). At the Rule 29.15 hearing, co-counsel Davis-Kerry could not recall whether or not she considered objecting earlier when the prosecutor first asked Appellant to comment on Abbey Rainwater's credibility. (PCR Tr. 284). Davis-Kerry was also unable to recall her reason for not objecting earlier. (PCR Tr. 284). Davis-Kerry testified on cross-examination that the

decision whether to object to a prosecutor's question has to be made in a second, and that she factors in whether the information being elicited by the question will hurt the defense. (PCR Tr. 330). Davis-Kerry said that she also considered whether any action she took at trial, including objections, would persuade or alienate the jury. (PCR Tr. 330-31).

In denying the claim, the motion court found that the prosecutor's unobjected-to questions were not proper cross-examination. (PCR L.F. 206). But the court also found that the questions were not inflammatory and did not have any impact on the jury's decision. (PCR L.F. 206).

B. Analysis.

Ineffective assistance of counsel is rarely found in cases of a failure to object. *Worthington*, 166 S.W.3d at 581. It will only be deemed ineffective when the defendant has suffered a substantial deprivation of his right to a fair trial. *Id.* As an initial matter, because Davis-Kerry could not recall her reasons for not objecting sooner than she did, Appellant has not overcome the presumption that she made a strategic decision not to object to those earlier questions. *Rios*, 368 S.W.3d at 312. Counsel could have reasonably decided that any perceived harm from the initial questions was not that great and that it was better to let those questions go rather than drawing attention to them by objecting. *State v. Tokar*, 918 S.W.2d 753, 768 (Mo. banc 1996). Counsel could also have reasonably decided that once the questioning had

reached a certain point, the balance had shifted to where an objection was then necessary. Counsel cannot be ineffective for making reasonable choices of trial strategy in regards to objections, even if in hindsight another strategy might have been more favorable. *Worthington*, 166 S.W.3d at 582.

Appellant also cannot show that the failure to object sooner substantially deprived him of his right to a fair trial. Missouri courts have long held that it is improper for an attorney to directly ask one witness if another was lying. *State v. Roper*, 136 S.W.3d 891, 901 (Mo. App. W.D. 2004); *State v. Savory*, 893 S.W.2d 408, 411 (Mo. App. W.D. 1995); *Holliman v. Cabanne*, 43 Mo. 568, 570 (1869). But those courts have also found that the prejudicial effect of such questioning is difficult to establish. *Roper*, 136 S.W.3d at 903; *Savory*, 893 S.W.2d at 411. In the context of this case, the objectionable questions comprised a small part of the prosecutor's cross-examination of Appellant. The prosecutor also did not refer to the questioning in closing argument. *Roper*, 136 S.W.3d at 903.

Furthermore, the nature of the questioning itself is not unfairly prejudicial. As co-counsel Davis-Kerry noted, in testifying about another claim raised in the 29.15 motion, it is not unusual for jurors to hear different accounts of the facts at issue and it falls to the jurors to determine which version of events is credible. (PCR Tr. 339). When jurors hear conflicting evidence they are naturally going to conclude that some of the witnesses are

either mistaken or are lying. A question asking whether another witness is lying merely states an obvious alternative. And jurors will likely discount any answer given to that question, as they would expect the witness to maintain that their testimony was truthful and the other witness's was incorrect. Because that line of questioning does not appear reasonably likely to have any impact on the jury's determination of the issues, courts have been correct in their assessment that "there are . . . more effective ways to reveal inconsistencies in witness' testimony." *Savory*, 893 S.W.2d at 411.

Appellant's burden in establishing prejudice is to show a reasonable probability that the jury, balancing all the circumstances, would not have recommended the death penalty. *Zink*, 178 S.W.3d at 176. When a few unobjected-to questions, which probably had no effect on the jury, are viewed in the context of all the evidence presented at the trial, there is no reasonable probability that an earlier objection would have changed the jury's sentencing verdict. Appellant's point should be denied.

VI.

Trial counsel was not ineffective for failing to object to, or seek redaction of, State's Exhibit 38 (responds to Appellant's Point VIII).

Appellant claims that trial counsel was ineffective for failing to object to the wholesale admission of State's Exhibit 38, a copy of an *ex parte* order of protection issued against Appellant and in favor of Abbey Rainwater. Appellant claims that counsel should either have objected to admission of the exhibit or should have requested the redaction of language indicating the existence of good cause to issue the order. But the exhibit was admissible, so an objection to its admission would not have been successful. And the language that Appellant claims should have been redacted was non-specific and not set out in the document in a way that made it reasonably likely to be noticed by the jury. Appellant thus cannot show that he was prejudiced by counsel's actions.

A. Underlying Facts.

1. Trial Proceedings.

Defense counsel filed a Motion to Exclude Bad Acts in the Penalty Phase. (Tr. 11: L.F. 57-60). Counsel argued at a pre-trial hearing that admitting such evidence violated due process because the jury was not given any guidance about the burden of proof that applied to that evidence. (Tr. 12). Defense counsel stated that she anticipated that the State might put on

evidence of alleged acts of domestic violence by Appellant against Abbey Rainwater. (Tr. 12-13). The prosecutor responded that the deterioration of their relationship, that resulted in a restraining order against Appellant, was relevant to motive. (Tr. 13). The trial court overruled the motion. (Tr. 16). Defense counsel renewed the motion at a hearing the day before the trial began, and it was again overruled. (Tr. 49-50).

Abbey Rainwater testified at trial that her relationship with Appellant had soured, causing her and her father to file for a restraining order on the day of the murders. (Tr. 644-45). Abbey identified State's Exhibit 38 as the protective order that she obtained against Appellant. (Tr. 645). When the exhibit was offered into evidence, defense counsel responded, "Pursuant to our previous objection." (Tr. 645). The exhibit was admitted. (Tr. 645). Towards the end of Abbey's direct testimony, the prosecutor requested permission to pass the exhibits that had been admitted. (Tr. 654-55). The court granted the request and the exhibits were displayed to the jury. (Tr. 655). The transcript does not specify the exhibits that were displayed. The order of protection contains the following boilerplate language:

> The Petitioner has filed a verified petition requesting an ex parte order of protection, and pursuant to Sections 455.510 to 455.520, RSMo, the Court finds that there is good cause to issue an ex

parte order of protection and that no prior order regarding custody is pending or has been made.

(State's Ex. 38).

The contents of the exhibit were not discussed by Abbey or the remaining State's witnesses, or during the prosecutor's closing argument. (Tr. 645-730, 892-901, 921-26). Abbey did testify without objection on redirect examination, after the exhibit had been passed to the jury, that she was awarded a temporary restraining order because Appellant beat her. (Tr. 678). She also testified, without objection, that there had been other incidents of abuse than the one that led her to get the restraining order. (Tr. 680). She testified that those incidents started when she became pregnant and involved multiple incidents of Appellant choking her, hitting her, and shoving her down. (Tr. 680). Defense counsel cross-examined Abbey about one of those incidents, and elicited evidence that she had gone to an apartment where Appellant was alone with another woman and broke the glass door, reached in and unlocked the door, and then entered the apartment. (Tr. 681-82). Abbey testified that Appellant grabbed her by the throat and carried her through the apartment, but she also said that he later apologized and admitted that he then spent the night with her and that she never told anyone that he had been violent with her. (Tr. 683).

The prosecutor made two references in his initial argument to the fact that the restraining order was issued. In the first reference, the prosecutor said:

> He tells us he never physically abused Abbey, yet Abbey managed to get a restraining order based on the injuries she showed to the authorities. So apparently that's not true.

(Tr. 894). Later in the argument, the prosecutor said:

> Remember that when he talked with Abbey and he was told about the restraining order, he said, "Well, I guess I know what I've got to do." And then he stole a gun, and he went over there and he killed these people.

(Tr. 900). The record contains no evidence indicating that any exhibits were requested by the jury or sent to the jury room during deliberations.

2. Rule 29.15 Proceedings.

The amended 29.15 motion alleged that counsel was ineffective for failing to object to the admission of the order, the viewing of it by the jury, and the State's argument that the obtaining of the order was proof that the assault had actually occurred and that Appellant was lying. (PCR L.F. 83).

Co-counsel Davis-Kerry testified at the 29.15 hearing that she did not recall considering an objection to admission of the order on the basis that it was a civil order issued without any notice to Appellant and without any kind

of due process rights afforded to the person who the order is entered against. (PCR Tr. 282-82). When asked if she had a strategy reason for objecting on that basis, Davis-Kerry answered, "Not that I recall." (PCR Tr. 282).

Co-counsel Turlington testified that she did not have a specific recollection of considering an objection to the admission of the order or asking the court to redact the paticular findings made by the judge in that case. (PCR Tr. 391). Turlington also had no independent recollection of a trial strategy for not making that objection. (PCR Tr. 391).

In denying the claim, the court found that evidence of the child protection order was admissible because it was, under the State's theory of the case, the catalyst for Appellant's decision to commit the murders. (PCR L.F. 205). The court found that counsel cannot be faulted for failing to make a meritless objection. (PCR L.F. 205). It further stated that since the trial was a penalty phase proceeding, the evidence was proper and relevant. (PCR L.F. 205-06).

B. Analysis.

In analyzing Appellant's claim, it is important to note the scope of that claim. Appellant is not arguing that evidence of the issuance of the protective order was inadmissible and that counsel should have objected to such evidence. His claim is instead limited to the failure to object to the

admission of the physical copy of the protective order, or in the alternative, to request redaction of certain language contained in the order.

Ineffective assistance of counsel is rarely found in cases of a failure to object. *Worthington*, 166 S.W.3d at 581. It will only be deemed ineffective when the defendant has suffered a substantial deprivation of his right to a fair trial. *Id.* Because neither of Appellant's counsels could recall why they did not object to the admission of the exhibit on the grounds set forth in the 29.15 motion, Appellant has not overcome the presumption that their failure to object was a matter of trial strategy. *Rios*, 368 S.W.3d at 312.

Even if Appellant had overcome the presumption of trial strategy, he still has to show that an objection would have been upheld had it been made. *Glass v. State*, 227 S.W.3d 463, 473 (Mo. banc 2007). During the penalty phase, both the State and the defense may introduce any evidence pertaining to the defendant's character, including evidence detailing the circumstances of prior convictions, evidence of a defendant's prior unadjudicated criminal conduct, and evidence of the defendant's conduct subsequent to the crime being adjudicated. *State v. Bowman*, 337 S.W.3d 679, 691 (Mo. banc 2011). The trial court has broad discretion during the penalty phase to admit any evidence it deems helpful to the jury in assessing punishment. *Id.* The motion court correctly determined that the protective order was admissible,

and the court's findings demonstrate that an objection would have been unsuccessful. (PCR L.F. 205-06).

Nor has Appellant demonstrated that he was prejudiced by admission of the exhibit. Appellant makes numerous references to "factual allegations" contained in the order, but even if it is assumed that State's Exhibit 38 was among the exhibits passed to the jury, it is unclear from the record that the jury had the opportunity to view those factual allegations. The exhibit is contained in a plastic envelope with the exhibit sticker affixed to the outside of the envelope rather than to the document itself. (State's Ex. 38). The only pages visible are the order of protection, which contains no factual allegations other than the names and addresses of Stephen and Abbey Rainwater and of Appellant, and a page containing the signatures of Stephen Rainwater and of a clerk. (State's Ex. 38). The Petition for Order of Protection is included within the envelope and does contains specific allegations of abuse by Appellant, but those pages would only have been seen by the jury if the document was removed from the plastic envelope in the jurors' presence. There is nothing in the trial record to indicate that the document was removed from the plastic envelope or that the jurors saw the contents of the petition. And there is no reason to believe that the jurors would have removed the document from the envelope, since no mention was made that the exhibit consisted of anything more than the order and the presence of

additional pages would not have been readily apparent to a juror viewing the exhibit through the envelope. More significantly, Appellant failed to elicit any evidence at the Rule 29.15 hearing that would establish that the jury saw the actual Petition for Order of Protection. Appellant bears the burden of establshing the existence of prejudice by a preponderance of the evidence. *Zink*, 278 S.W.3d at 175. Appellant has failed to meet that burden.

The failure to establish that the jury saw the petition distinguishes this from the *Clevenger* case cited by Appellant, where the defendant did not complain about admission of the *ex parte* order of protection, but instead posited error from the publishing to the jury of the Petition for Order of Protection, which did contain detailed allegations of specific acts of abuse.[12] *State v. Clevenger*, 289 S.W.3d 626, 628-30 (Mo. App. W.D. 2009). The exhibit was found to be prejudicial because the jury was not admonished that it could not use the evidence of uncharged misconduct as evidence of the defendant's

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[12] The family court order objected to in the West Viriginia case cited by Appellant contained inflammatory and detailed statements by the family court judge that essentially found that the defendant committed the same type of acts that she was accused of committing in the criminal case. *State v. Donley*, 607 S.E.2d 474, 481-82 (W. Va. 2004). No such detail appears in the order of protection issued against Appellant.

guilt of the charged offense, and because the complaining witness did not testify and was thus not subject to cross-examination. *Id.* at 630. Here, the record does not establish that the jurors saw the petition and the allegations contained in it. And the exhibit was not used to argue Appellant's guilt of the charged crime. The *Jackson* case cited by Appellant similarly involved an attempt by the State to use a prior civil order to argue the defendant's guilt of the criminal charge being adjudicated. *State v. Jackson*, 155 S.W.3d 849, 853-54 (Mo. App. W.D. 2005). Here, the prosecutor appropriately used the issuance of the order of protection to question the credibility of Appellant's testimony that he had not been abusive towards Abbey Rainwater. It also bears repeating that Appellant's claim is limited to the admission of the physical exhibit, and not to testimony that the order had been issued. A successful objection by defense counsel to the admission of the physical exhibit would not have prevented the prosecutor from making the argument that he did.

The good cause language from the order that Appellant claims should have been redacted appears in the middle of a boilerplate paragraph set in relatively small type. (State's Ex. 38). It is, in fact, set in smaller type than other portions of the order. (State's Ex. 38). There is nothing to draw the jury's attention to that language. If anything, the jury's attention would be drawn away from the paragraph and towards the portions of the documents

set in larger type, as well as two sections that are highlighted with a yellow marker – Stephen and Abbey Rainwater's names, and the time and date of a scheduled hearing on the case. (State's Ex. 38). There is no reason to believe that the jury noticed that good cause language, much less took it into account in reaching its sentencing decision.

Appellant's burden in establishing prejudice is to show a reasonable probability that the jury, balancing all the circumstances, would not have recommended the death penalty. *Zink*, 178 S.W.3d at 176. When the unhighlighted boilerplate language of the protective order is viewed in the context of all the evidence presented at the trial, there is no reasonable probability that a successful objection to that language would have changed the jury's sentencing verdict. Appellant's point should be denied.

VII.

Counsel was not ineffective for recommending that Appellant testify (responds to Appellant's Point IX).

Appellant claims that counsel was ineffective for advising him to testify and for failing to advise him during the trial not to testify. But counsel gave Appellant competent advice on whether or not to testify and advised him of the pros and cons of his testifying. The record also demonstrates that Appellant was advised, and understood, that the decision to testify was his alone, and Appellant failed to elicit evidence showing that he would have followed counsel's recommendation not to testify had such advice been given.

A. Underlying Facts.

1. Trial Proceedings.

Before Appellant took the stand, the trial court gave him the following admonishment:

> THE COURT: Mr. Anderson, before you begin, I would advise you that even though this is late in the game, you have the right not to testify on this matter should you choose. I'm sure you've discussed this with your lawyers, and I'm sure you have made up your mind. I'm not telling you what you should or shouldn't do, but I'm compelled to advise you that you do not have to testify if you don't want to. If you'd like some additional

time to consider this, if you'd like some additional time to confer with your counsel, you may do so.

THE DEFENDANT: No, I'm going to do it.

(Tr. 750). When Appellant took the stand, counsel asked him why he was testifying:

A. I just want everybody to know what actually happened that night. I don't – I feel I owe it to their family.

Q. Say again. I'm sorry. We're having a very hard time hearing you.

A. I feel I owe it to their family to really know what happened. You know, I just want to get it all out there in the open.

(Tr. 751).

2. Rule 29.15 Proceedings.

The amended 29.15 motion alleged that counsel was ineffective for initially advising Appellant to testify, and then, during trial, failing to advise him that he would hurt his case if he testified. (PCR L.F. 102). The amended motion alleged that counsel should have made clear that his proposed testimony varied from the physical evidence and from the testimony of the police. (PCR L.F. 106). The motion further alleged that Appellant would have followed the advice of counsel and, by not testifying, would have

precluded the prosecutor's arguments that Appellant had lied to the jury. (PCR L.F. 106-07).

Appellant did not appear, nor testify, at the 29.15 evidentiary hearing. (PCR Tr. 2-3, 18, 217). Post-conviction counsel testified that they conferred with Appellant, who indicated that he did not want to be brought to court for the hearing. (PCR Tr. 343).

Co-counsel Davis-Kerry testified that several months before trial, she and co-counsel Turlington began discussing amongst themselves, and with Appellant, the pros and cons of his testifying. (PCR Tr. 287). Davis-Kerry said that she had gone to Appellant and told him that he should consider testifying. (PCR Tr. 289). But she said that the issue of testifying is always the client's decision, and she would never tell a client that she thought they should or should not testify. (PCR Tr. 289). Davis-Kerry said that Appellant was concerned about his ability to find the right words to express himself, and was also concerned that the State's cross-examination would cause him to lose his temper and shut down. (PCR Tr. 290). Davis-Kerry said that she and Turlington explained to Appellant that it was frightening to testify and that nerves could cause him to forget to say what he wanted to say. (PCR Tr. 322). Counsel spent several months at the prison in Potosi, walking Appellant through the various areas that they wanted him to testify about, in the event that he chose to testify, and through potential areas of cross-

examination. (PCR Tr. 287, 322). They also conducted a mock cross-examination, using another attorney in their office. (PCR Tr. 322).

Davis-Kerry testified that she took Appellant's mental capabilities into account when advising Appellant, but did not see anything that made her doubt his competence to proceed. (PCR Tr. 291-92, 325). She believed Appellant capable of testifying. (PCR Tr. 325). Davis-Kerry said that she was aware that Appellant's version of events was somewhat different from what the State's witnesses were saying, but she never advised him not to testify because of those differences. (PCR Tr. 293). Davis-Kerry said that it is not unusual for witnesses on opposing sides to dispute each other, and she was not disturbed by the differences between Appellant's testimony and that of the State's witnesses. (PCR Tr. 339).

Davis-Kerry did say that after Appellant admitted to counsel that he did remember shooting Deborah Rainwater, there was a discussion during the overnight recess about whether it was still his intention to testify. (PCR Tr. 326). Davis-Kerry said that she never told Appellant that he had to testify. (PCR Tr. 326). While she had concerns that the prosecutor would cross-examine Appellant about his sudden ability to remember, that cross-examination never happened. (PCR Tr. 326-27).

Co-counsel Turlington could not recall exactly when the subject of testifying was broached with Appellant, but she said it would have occurred

at least six months before trial. (PCR Tr. 398). Turlington said that Appellant did not immediately jump on the idea, and he did express concerns that he might become angry and lose his cool during cross-examination. (PCR Tr. 398-99). He also expressed concerns about becoming nervous and engaging in inappropriate laughing. (PCR Tr. 399). Turlington said that Appellant was a soft-spoken person who did not seem scary and dangerous, and that she and Davis-Kerry felt that it would be in Appellant's best interest to testify in order to convey what led up to the shooting and to convey that he was not a really violent person. (PCR Tr. 399). Turlington said that she did not have any more concerns about Appellant testifying than she would have with any other client. (PCR Tr. 400). She was also not concerned that Appellant had an IQ of 84, saying that level is not unusual for the population base that she deals with. (PCR Tr. 401).

Turlington said that Appellant's testimony went relatively as she expected. (PCR Tr. 401). She also acknowledged some inconsistencies between Appellant's testimony and that of the State's witnesses. (PCR Tr. 402). Turlington did not recall advising Appellant not to testify because of those inconsistencies. (PCR Tr. 402). Turlington did say that she and Davis-Kerry did talk to Appellant about how his revelation of remembering the Deborah Rainwater murder fit into his decision to testify. (PCR Tr. 420). She testified that Appellant understood that the ultimate decision whether or not

to testify was his. (PCR Tr. 420). Turlington said that by that time, Appellant was wanting to testify. (PCR Tr. 421). She did not remember ever telling Appellant that he should not testify. (PCR Tr. 427).

In denying the claim, the motion court found that counsel informed Appellant of his right to testify, competently advised him of the risks and benefits of testifying, and made a sound strategic decision to advise Appellant that testifying might be in his best interests. (PCR L.F. 245). The court found that Appellant's testimony allowed counsel to argue that Appellant acknowledged responsibility for his crimes. (PCR L.F. 245).

B. Analysis.

The decision to testify solely rests with the defendant, but the defendant is entitled to receive "reasonably competent advice." *Rousan*, 48 S.W.3d at 585. Without more, advice from counsel on whether or not to testify is not deemed ineffective assistance of counsel if it might be considered sound trial strategy. *Id.*

The testimony of Davis-Kerry and Turlington shows that their recommendation that Appellant testify was a matter of sound trial strategy. Both counsel felt that it would be in Appellant's best interest to testify in order to convey what led up to the shooting and to convey that he was not a really violent person. (PCR Tr. 399). Turlington, in particular, noted Appellant's quiet and soft-spoken demeanor. (PCR Tr. 399). Counsel could

reasonably believe that giving the jury an opportunity to view that demeanor would have a bigger impact than character testimony from other witneses.

Appellant's main complaint about the reasonableness of the strategy is that his testimony did not match up with that of the State's witnesses, allowing the prosecutor to argue that he was a liar. But under that standard, virtually all advice to testify has to be considered unreasonable. As co-counsel Davis-Kerry correctly noted, differing testimony among witnesses is commonplace. (PCR Tr. 339). It was up to the jurors to decide witness credibility, and counsel need not assume that the jury will conclude that the defendant is lying. In any event, counsel could reasonably believe that the differences in Appellant's testimony and that of the State's witnesses were outweighed by Appellant taking responsibility for his actions in front of the jury and explaining to the jury what led him to those actions.

Appellant has also failed to show that he was prejudiced by counsel's advice. As noted above, the decision whether or not to testify rests solely with the defendant. *Id.* The attorney's duty on the question of the defendant testifying is to advise his client of the consequences of his choice and then to implement the decision made by the client. *State v. Holcomb*, 956 S.W.2d 286, 296 (Mo. App. W.D. 1997). The record demonstrates that counsel spent a considerable amount of time discussing with Appellant the pros and cons of his testifying, that counsel covered possible areas of cross-examination with

Appellant, and even conducted a mock cross-examination using another attorney who was not part of the defense team. (PCR Tr. 287, 322, 326, 420). *See State v. Wright*, 934 S.W.2d 575, 586 (Mo. App. S.D. 1996) (counsel gave competent advice where he had ongoing discussions with defendant about whether he should testify and where conducted a mock cross-examination of the defendant); *State v. Bailey*, 839 S.W.2d 657, 663 (Mo. App. W.D. 1992) (counsel not ineffective where he advised defendant of the consequences of his taking the witness stand).

In cases where a defendant has alleged that his counsel has refused to allow him to testify, courts have required the defendant to put on evidence demonstrating that he requested to testify and the attorney refused that request. *See*, *e.g.*, *Kenney v. State*, 46 S.W.3d 123, 129 (Mo. App. W.D. 2001); *State v. Hunter*, 939 S.W.2d 542, 546 (Mo. App. E.D. 1997). Conversely, because Appellant is claiming that counsel was ineffective for not advising him not to testify, he had the burden of proving that he would have followed that advice had it been given. While Appellant alleged in the amended 29.15 motion that he would have taken counsel's advice not to testify, he failed to present any evidence at the 29.15 hearing to support that allegation. Allegations in a post-conviction motion are not self-proving, and the movant bears the burden of producing evidence in support of his claims by a preponderance of the evidence. *McCain v. State*, 317 S.W.3d 657, 660 (Mo.

App. S.D. 2010). Appellant refused to take even the simple step of appearing at the 29.15 hearing and testifying that he would have heeded counsel's advice not to testify, had that advice been given.

Appellant also failed to show that counsel misled him about his right not to testify or that he was ignorant of that right. *See Kenney*, 46 S.W.3d at 129. In fact, the record establishes both that Appellant was advised of his right and understood it. *Wright*, 934 S.W.2d at 586. Counsel explained to Appellant that the decision whether or not to testify was his to make, and the trial court explained the same to Appellant before he testified. (PCR Tr. 289, 420; Tr. 750). Appellant stated unequivocally that he wanted to take the stand. (Tr. 750). Counsel will not be found ineffective for failing to save a client from the effect of the client's own informed decision. *Holcomb*, 956 S.W.2d at 296.

Appellant failed to demonstrate that counsel was ineffective or that he was prejudiced. His point should be denied.

VIII.

Direct appeal counsel was not ineffective for not briefing a claim that Appellant's death sentence was disproportionate (responds to Appellant's Point X).

Appellant claims that direct appeal counsel was ineffective for not briefing a claim that Appellant's sentence was disproportionate. But this Court fulfilled its statutory duty to conduct proportionality review, and a majority of the Court found that the death sentence as applied to Appellant was not disproportionate. Appellant is thus not only trying to relitigate an issue already decided on direct appeal, but he has failed to demonstrate a reasonable probability of a different outcome had appellate counsel briefed the issue.

A. Underlying Facts.

1. Direct Appeal Proceedings.

Appellant's direct appeal brief contained eight points alleging error. (SC89895 Appellant's Brf.). The brief did not include a point alleging that Appellant's sentence was disproportionate. In its opinion affirming the sentence, this Court engaged in the proportionality review required by section 565.035.3, RSMo. *Anderson III*, 306 S.W.3d at 543. The Court first looked at whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. *Id.* at 543-44. The Court

stated, "Anderson does not allege, **and a thorough review of the record does not indicate**, that the death sentence was influenced by passion, prejudice, or other arbitrary factors." *Id.* at 544 (emphasis added).

The Court next considered whether the evidence supported the aggravating factors found by the jury: (1) that the murder of Deborah Rainwater was committed while Appellant was engaged in the commission or attempted commission of another unlawful homicide and (2) that the murder of Deborah Rainwater was outrageously or wantonly vile, horrible, or inhumane in that it involved depravity of mind because Appellant killed Deborah Rainwater as part of a plan to kill more than one person, exhibiting a callous disregard for the sanctity of human life. *Id.* The Court noted that Appellant shot Deborah Rainwater shortly before shooting Stephen Rainwater, and that he shot Deborah Rainwater as she begged for her life and was holding Appellant's infant child. *Id.* The Court found the evidence supported, beyond a reasonable doubt, the aggravating circumstances found by the jury. *Id.*

The Court next concluded that the death sentence was neither excessive nor disproportionate to the death penalty imposed in similar cases. *Id.* The Court cited several cases where the defendant killed more than one victim and the death sentence was upheld. *Id.* The court further cited cases upholding the death sentence where the murder involved depravity of mind

showing a callous disregard for human life. *Id.* Finally, the Court noted cases upholding the death sentence where the defendant murdered someone who was helpless and defenseless, as Deborah Rainwater was when Appellant shot her. *Id.*

In a concurring opinion, Judge Breckinridge agreed that Appellant's death penalty was not disproportionate, but faulted the majority for not considering similar cases in which the defendant received a sentence of life imprisonment without parole. *Id.* at 544-45 (Breckinridge, J., concurring).[13] The concurring opinion noted that while Appellant did not raise a claim that his sentence was disproportionate, the Court was required by section 565.035.3, RSMo to conduct proportionality review *sua sponte*. *Id.* at 546 (Breckinridge, J., concurring). The concurrence proceeded to discuss cases involving multiple murders that resulted in a sentence of life without parole, noting that in most of those cases, more than one person was implicated in the crime and there was conflicting evidence as to who actually committed the murders. *Id.* at 546-47 (Breckinridge, J., concurring). The concurring

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[13] Judge Wolff, in a dissenting opinion, stated that he would have reversed the verdict for instructional error, but also stated that he concurred with Judge Breckinridge on the issue of the scope of proportionality review. *Id.* at 547-48, 551 (Wolff, J., dissenting).

opinion found those cases distinguishable, in that Appellant was clearly the sole perpetrator of the crime, that the murder was part of a plan to kill more than one person, and that five other lives, including that of Appellant's three-month-old child, were endangered during his killing spree. *Id.* at 547 (Breckinridge, J., concurring). The concurring opinion stated that a review of factually similar cases where a life sentence was imposed did not change the conclusion that Appellant's sentence was neither excessive nor disproportionate. *Id.* (Breckinridge, J., concurring).

2. Rule 29.15 Proceedings.

The amended 29.15 motion alleged that direct appeal counsel was ineffective for failing to file a brief and present arguments that would have shown that Appellant's sentence was disproportionate. (PCR L.F. 92-93). The amended motion alleged that counsel did raise a proportionality argument in a rehearing motion, but that did not cure counsel's failure. (PCR L.F. 98). The motion further alleged that had counsel briefed the issue, the Court would have compared Appellant's case to similar cases where the defendant received a life sentence. (PCR L.F. 100-01).

Direct appeal counsel Deborah Wafer testified that she had been employed with the Missouri Public Defender System since 1989, and had been with the Eastern Capital Office since 1998. (PCR Tr. 218). She testified that she had handled about a dozen death penalty appeals. (PCR Tr. 233).

Wafer testified that she had, on occasion, raised proportionality claims in briefs that she had filed. (PCR Tr. 226). Wafer testified that it was her recollection that she considered raising a proportionality claim in Appellant's brief. (PCR Tr. 226). She said that she believed a proportionality claim had been raised in the brief filed in the direct appeal following Appellant's first trial.[14] (PCR Tr. 226). Wafer said that after receiving the Court's opinion and seeing how it had conducted proportionality review, she wanted to bring some matters to the Court's attention and included a proportionality claim in the motion for rehearing. (PCR Tr. 227). Wafer said that she made a conscious decision not to include proportionality review in the brief, but said that she had no strategic reason for not raising it. (PCR Tr. 228). Wafer did note that she had never prevailed on a proportionality claim in the past. (PCR Tr. 228). Wafer also said she had argued unsuccessfully in the past that the Court should look at similar non-death cases in conducting proportionality review. (PCR Tr. 228-30). Wafer acknowledged that the

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[14] Point VII of that brief claimed that the Court, in the exercise of its independent proportionality review, should find that an arbitrary factor (race) played a role in the State's decision to seek the death penalty, and that Appellant's sentence should thus be reduced to life without parole. (SC86680 Appellant's Brf., p. 32).

Court is statutorily required to address proportionality and that it did address it in Appellant's direct appeal. (PCR Tr. 232).

In denying the claim, the motion court said that it did not believe that Wafer did not have a strategic reason for not briefing proportionality, her testimony notwithstanding. (PCR L.F. 207). The court found that Wafer had researched the issue, had raised the issue in the past in other cases, and felt that she was not getting relief from the Missouri Supreme Court on that issue. (PCR L.F. 207). The court found that Wafer made a conscious decision to not raise the issue. (PCR L.F. 207).

The court also stated its belief that Appellant's sentence was not disproportionate and Appellant was thus not prejudiced by the failure to raise the issue on appeal. (PCR L.F. 207-08). The court noted that Appellant carried out a premeditated, planned murder of his girlfriend's parents and that he also would have murdered his girlfriend if he had found her. (PCR L.F. 207-08).

B. Analysis.

Issues decided on direct appeal cannot be relitigated in a post-conviction proceeding on a theory of ineffective assistance of counsel. *Leisure v. State*, 828 S.W.2d 872, 874 (Mo. banc 1992). Appellant's point seeks to have this Court relitigate the issue of whether his sentence was

proportionate, a determination expressly made by this Court on direct appeal. That determination should operate as a bar to Appellate's claim.

Even if the claim is considered on its merits, Appellant is not entitled to relief. Appellate counsel is under no duty to present non-frivolous issues where counsel strategically decides to winnow out arguments in favor of other arguments.[15] *Storey*, 175 S.W.3d at 148. That is especially true when it comes to the issue of proportionality review, since the Court is statutorily required to conduct such a review whether briefed or not. § 565.035.1, RSMo 2000. This Court is even required to conduct proportionality review when the defendant waives his right of direct appeal. § 565.035.7, RSMo 2000. Contrary to Appellant's assertions, the failure to include a proportionality claim in a brief is therefore not analagous to the failure to file a brief, since the issue of proportionality will be given a thorough and complete review even when it is not included in a brief.

In fact, Appellant's point seems premised on the idea that this Court is incapable of fulfilling its statutory obligation in the absence of briefing by a

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[15] While counsel claimed to not have a strategic reason for not raising a proportionality claim, the motion court was not required to believe that testimony and did not, in fact believe it. (PCR L.F. 207). *Rios*, 368 S.W.3d at 317. That credibility determination is entitled to deference by this Court. *Id.*

defendant. Appellant lists several cases where the defendant received a sentence of life without parole that he says should have been brought to the Court's attention. This Court has, of course, been divided on the question of whether proportionality review requires the Court to look only at factually similar death sentences or whether it must also consider cases where life without parole sentences were imposed. *See Deck v. State*, 303 S.W.3d 527, 563 (Mo. banc 2010). That division has continued post-*Anderson III*. *See State v. Dorsey*, 318 S.W.3d 648, 659-60 (Mo. banc 2010) (Price, C.J., concurring). Appellate counsel Wafer testified that she had attempted in the past to convince the Court to include life without parole cases in its proportionality review, but had been unsuccessful in doing so. (PCR Tr. 228-30). There is no reason to believe that she would have persuaded any members of the Court to change their views on the appropriate scope of proportionality review. Citing those life without parole cases in a brief thus would not have changed the votes of three of the four members of the Court who upheld Appellant's sentence as proportional. *See id.*

The members of the Court that considered life without parole cases in conducting proportionality review at the time of *Anderson III* had access to the accumulated records of all cases in which the penalty of life without parole or death has been imposed since at least May 27, 1977. § 565.035.6, RSMo 2000. There is no basis to conclude that the cases cited by Appellant

were not considered by those judges. Yet not a single one of those judges expressed the view that Appellant's sentence was disproportionate.

Instead, one of those judges helped to create the majority that upheld Appellant's sentence as proportionate. *Anderson III*, 306 S.W.3d at 544-45 (Breckinridge, J., concurring). Even had direct appeal counsel raised proportionality in her brief, there is no reasonable probability that the outcome of the appeal would have been different. *Williams*, 168 S.W.3d at 444. Appellant's point should be denied.

CONCLUSION

In view of the foregoing, Respondent submits that the denial of Appellant's Rule 29.15 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 21,812 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 31st day of August, 2012, to:

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